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No. 2440

United States
Circuit Court of Appeals

For the Ninth Circuit.

EDWIN RICHARDS,

Plaintiff in Error,

vs.

AMERICAN BANK OF ALASKA, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska,
Fourth Division.

Filed

AUG 19 1914

F. D. Monckton,
Clerk.

(Testimony of Edward Williams.)

quarter interest? [32]

A. I had the bill of sale made up both in the *same*.

Q. In whose name was the bill of sale made?

A. Richards and Williams.

Q. After you saw Mr. Hurley, what, if anything, did you do with the money that you had in the Miners & Merchants' Bank?

A. I got my money out of there, and took it down to Mr. Hurley.

Q. State the conversation, if any you had with Mr. Hurley at the time you went to borrow the money first—that first conversation.

A. I told Mr. Hurley that I had no power of attorney.

Q. No power of attorney from whom? Tell us what you told Mr. Hurley.

A. I told Mr. Hurley that I had no power of attorney from Mr. Richards, and any agreement between Mr. Richards and I was verbal.

Q. What did you tell him the agreement was between you and Mr. Richards?

A. That he was my partner.

Mr. PRATT.—We object and move that that be stricken.

The COURT.—It may stand for the present. I understand that such a statement is not evidence of a partnership unless there is evidence of a partnership in support of it.

Mr. CLARK.—We will connect it up.

Mr. PRATT.—There is nothing to show a mining copartnership.

(Testimony of Edward Williams.)

The COURT.—There is other evidence from which that inference might be drawn.

Mr. MARQUAM.—We have the privilege of renewing the motion to strike if the evidence is not sufficient to connect it up.

The COURT.—Yes. [33]

Mr. CLARK.—Q. Did you ask Mr. Hurley at that time whether or not he was acquainted with Mr. Richards? A. Yes. I think I did.

Q. In addition to your telling Mr. Hurley that Mr. Richards was your partner, what did you tell Mr. Hurley about the loan that you desired?

A. Well, I told him what I figured on doing with the money, if that is what you mean.

Q. Yes. That is what I want.

A. What I intended to do with the money; Mr. Boulton had a mortgage on the ground and he had done business with Mr. Hurley, and I was to assume the mortgage—

Q. How much was the mortgage for?

A. \$1,500.00.

Q. How much money did you ask to borrow at that time? A. \$3,500.00.

Q. Now, when you went to borrow—(interrupted).

Q. What, if anything, was said between you and Mr. Hurley in regard to how the money should be deposited?

A. Mr. Hurley suggested that I should sign it in Richards & Williams name, because if anything happened to me no one could get the money without a good deal of trouble.

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United States
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Plaintiff in Error,

vs.

AMERICAN BANK OF ALASKA, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska,
Fourth Division.

United States

District Court of Appeals

For the Southern District of New York

IN RE THE ESTATE OF JAMES H. HARRIS, DECEASED.

WILLIAM H. HARRIS, Executor.

Statement of Assets

Given With an Oath as the United States District Court
in the City of New York.

Filed for Record.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

McGOWAN & CLARK, Attorneys for Plaintiff in
Error and Appellee,
Fairbanks, Alaska.

LOUIS K. PRATT, THOS. A. MARQUAM, Attor-
neys for Defendants in Error and Appellants,
Fairbanks, Alaska. [1*]

*In the District Court for the Territory of Alaska,
Fourth Judicial Division.*

No. 1815.

AMERICAN BANK OF ALASKA, a Corporation,
Plaintiff,

vs.

EDWARD WILLIAMS and EDWIN RICH-
ARDS, Mining Copartners Engaged in Busi-
ness Under the Firm Name and Style of
RICHARDS & WILLIAMS, and RICH-
ARDS & WILLIAMS, a Mining Copartner-
ship,

Defendants.

Praeceptum for Transcript of Record.

The Clerk of the Court will please prepare and
certify a copy of the record in the action as follows:

1st: The Complaint, and Answer of defendant
Edwin Richards.

2nd: The Bill of Exceptions complete.

3rd: All journal entries connected with the Third
Trial, including the final Judgment.

*Page-number appearing at foot of page of original certified Record.

4th: All papers connected with the Writ of Error, except the Writ of Error, the Citation, the order extending time in which to file transcript in the Appellate Court, and the stipulations to printing record; the last four papers, being entitled in said Appellate Court, are to be forwarded to and filed there.

LOUIS K. PRATT & SON and
THOMAS A. MARQUAM,

Attorneys for Defendant Richards.

Service and receipt of copy admitted this 11th day of May, 1914.

McGOWAN & CLARK.

[Endorsed]: No. 1815. District Court, 4 Div., Territory of Alaska. American Bank of Alaska, a Corporation, vs. Edward Williams and Edwin Richards, Mining Copartners, etc. Praeceptum for Transcript of Record. Filed in the District Court, Territory of Alaska, 4th Div. May 12, 1914. Angus McBride, Clerk. [2]

[Caption and Title.]

Stipulation as to Printing Record.

It is stipulated between the attorneys for the parties respectively that in printing the record in this case for use in the said court, all captions should be omitted after the title of the cause has once been printed, and the words "Caption and Title" and the name of the paper or document should be substituted therefor; also that after printing the indorsements and file-marks on the complaint and answer, bill of

exceptions, record in the Appellate Court, and on the exhibits introduced in evidence and offered, the indorsements other than file-marks on all other papers should be omitted, and the word "Indorsements" printed in lieu thereof. All other parts of the record should be printed.

Dated May 11th, 1914.

LOUIS K. PRATT & SON and
THOMAS A. MARQUAM,
Attorneys for Plaintiff in Error.

McGOWAN & CLARK,
Attorneys for Defendant in Error. [21½]

[Endorsed]: No. —. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Edwin Richards, Pltff. in Error, Against American Bank of Alaska, a Corporation, Deft. in Error. Stipulation as to Printing Record. Filed in the District Court, Territory of Alaska, 4th Div. May 12, 1914. Angus McBride, Clerk.

[Caption and Title.]

Complaint.

Comes now the plaintiff above named and complains of the defendant above named and for cause of action alleges as follows, to wit:

1.

That plaintiff above named is a corporation, duly and regularly organized and existing under and by virtue of the laws of the State of Washington, and having a place of business and a duly authorized resident agent within the Fourth Judicial Division

of the Territory of Alaska.

2.

That at all the times hereinafter mentioned Edward Williams and Edwin Richards were a mining copartnership, engaged in business in the Iditarod district of the Territory of Alaska, under the firm name and style of Richards & Williams.

3.

That on or about the month of September, A. D. one thousand nine hundred ten, plaintiff above named, at the special instance and request of defendants above named, loaned to defendants a sum in excess of thirty-five hundred dollars [3] (\$3500.00), which said sum defendants promised and agreed to repay to plaintiff, and thereafter and on or about the twenty-fourth day of February, A. D. one thousand nine hundred eleven, said defendants, in consideration of the moneys theretofore loaned to them by plaintiff herein, made, executed, and delivered to plaintiff herein their certain promissory note, in the words and figures following, to wit:

Iditarod, Alaska, Feb. 24, 1911.

\$3500.00.

On or before July 1, 1911, after date, I promise to pay to the order of American Bank of Alaska, at its office in Iditarod, Alaska, Thirty-five hundred 00-100 Dollars, for value received, with interest after Date at the rate of Twelve per cent. per annum until paid. Principal and interest payable only in U. S. Gold Coin of the present standard of weight and fineness. For value received, each and every party signing or endorsing this note hereby waives pre-

sentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety, and promises, in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the court may adjudge reasonable as attorney's fees in such suit.

(Sgd.) RICHARDS & WILLIAMS.

By EDWARD WILLIAMS,

(Sgd.) EDWARD WILLIAMS.

(Sgd.) EDWIN RICHARDS.

By EDWARD WILLIAMS,

His Attorney in Fact.

4.

That said note is past due and no part thereof has been paid, and the whole thereof, both principal and interest, is now due, owing, and unpaid from defendants to plaintiff herein.

5.

That plaintiff has been compelled to, and has, employed attorneys to institute and prosecute this action for said sum, and has become liable to said attorneys for reasonable attorneys' fees, and plaintiff is informed and believes and so alleges that the sum of seven hundred fifty dollars (\$750.00) would be a reasonable sum to be allowed to its attorneys for their services in said action.

For a second and further separate cause of action against [4] defendant and in favor of plaintiff, plaintiff alleges as follows, to wit:

1.

That plaintiff above named is a corporation, duly and regularly organized and existing under and by

virtue of the laws of the State of Washington, and having a place of business and a duly authorized resident agent within the Fourth Judicial Division of the Territory of Alaska.

2.

That at all the times hereinafter mentioned, Edward Williams and Edwin Richards were a mining copartnership, engaged in business in the Iditarod district of the Territory of Alaska, under the firm name and style of Richards & Williams.

3.

That on and prior to the sixteenth day of September, A. D. one thousand nine hundred eleven, and within one year prior thereto, plaintiff above named, at the special instance and request of defendants herein, permitted said defendants to overdraw their account at the bank conducted by plaintiff in Iditarod, Alaska, in the sum of three hundred twenty-seven and 96/100 dollars (\$327.96), which said sum defendants promised and agreed to repay to plaintiff on demand.

4.

That plaintiff has demanded the payment of said sum, but to pay the same defendants have failed and neglected and do now fail and neglect.

5.

That there is now due, owing, and unpaid from defendants to plaintiff the said sum of three hundred twenty-seven and 96/100 dollars (\$327.96), together with interest thereon at the [5] rate of eight per centum per annum from the sixteenth day of September, A. D. one thousand nine hundred eleven, to date.

WHEREFORE: Plaintiff prays judgment against defendants above named, and each of them, and against the copartnership of Richards & Williams, as follows, to wit:

1.

On its first cause of action, for the sum of thirty-five hundred dollars (\$3500.00), together with interest thereon at the rate of twelve per centum per annum from the twenty-eighth day of February, A. D. one thousand nine hundred eleven, to date, together with an attorneys' fee in the sum of seven hundred fifty dollars (\$750.00).

2.

On its second cause of action, for the sum of three hundred twenty-seven and 96/100 dollars (\$327.96), together with interest thereon at the rate of eight per centum per annum from the sixteenth day of September, A. D. one thousand nine hundred eleven, to date.

3.

For costs of suit and for such other and further relief as to the Court shall appear meet, just, and equitable in the premises.

McGOWAN & CLARK,
Attorneys for Plaintiff.

Territory of Alaska,
Fairbanks Precinct,—ss.

C. J. Hurley, being first duly sworn according to law, on his oath deposes and says: I am the President of American Bank of Alaska, the plaintiff in the above-entitled action, and make this affidavit for and in behalf of said American Bank of [6]

Alaska, which is a corporation; I have read the within and foregoing complaint, know the contents thereof, and the same is true as I verily believe.

C. J. HURLEY.

Subscribed and sworn to before me on this fourteenth day of August, A. D. one thousand nine hundred twelve.

[Seal] RICHARD H. GEOGHEHAN,
Notary Public in and for the Territory of Alaska.

[Endorsed]: No. 1815. In the United States District Court, Territory of Alaska, Fourth Division. American Bank of Alaska, a Corporation, Plaintiff, vs. Edward Williams et al., Defendants. Complaint. Filed in the District Court, Territory of Alaska, 4th Div. Aug. 14, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [7]

[Caption and Title.]

Separate Answer of the Defendant Edwin Richards.

Comes now the defendant Edwin Richards, by Louis K. Pratt & Son, his attorneys, and for his separate answer to that part of the plaintiffs' complaint herein purporting to be a first cause of action, alleges:

1.

That he admits the organization and corporate capacity of the plaintiff as stated in paragraph 1 in said supposed first cause of action found on page one thereof, but denies each and every allegation, statement, matter and thing contained in paragraphs 2, 3 and 4 on pages one and two of the said complaint,

and as to the statements and allegations of paragraph 5 thereof on page 2, this answering defendant denies that he has knowledge or information concerning the same sufficient to form a belief.

THE DEFENDANT EDWIN RICHARDS FOR HIS SEPARATE ANSWER TO THAT PART OF THE PLAINTIFF'S COMPLAINT DESIGNATED "A SECOND AND FURTHER SEPARATE CAUSE OF ACTION," ETC., COMMENCING ON PAGE 2 AND CONTINUING TO THE TOP OF PAGE 4 THEREOF, says:

That he admits the corporate organization and capacity of the plaintiff to transact business in the Territory of Alaska, as stated by it in paragraph 1 on page 3 of the said complaint, but denies each and every allegation, statement, matter and thing [3] contained in paragraphs 2, 3, 4 and 5 of the said "second and further separate cause of action," etc., found on page 3 and at the top of page 4 of the said complaint.

WHEREFORE this answering defendant prays judgment that he may go hence without day; that the plaintiff have nothing as against him by his said complaint, and that this answering defendant be allowed his costs and disbursements herein expended.

LOUIS K. PRATT & SON,

Attorneys for Defendant Richards.

United States of America,
Territory of Alaska,—ss.

Edwin Richards, being first duly sworn, on oath says: That he is one of the defendants in the above-entitled action; that he has read the foregoing an-

swer; knows the contents thereof, and that the same is true, as he verily believes.

EDWIN RICHARDS.

Subscribed and sworn to before me this 9th day of April, 1913.

[Seal]

LOUIS K. PRATT,

Notary Public in and for Alaska.

Due and legal service of the foregoing answer, by receipt of copy thereof, is hereby admitted, this 9th day of April, 1913.

McGOWAN & CLARK,

Attorneys for Plaintiff.

[Endorsed]: No. 1815. District Court, Territory of Alaska, 4th Division. American Bank of Alaska, a Corporation, Plaintiff, vs. Edward Williams and Edwin Richards, Mining Copartners Engaged in Business Under the Firm Name and Style of Richards & Williams, and Richards & Williams, a Mining Copartnership, Defendants. Separate Answer of the Defendant Edwin Richards. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 10, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [9]

[Minutes of Court—March 24, 1914.]

[Caption and Title.]

Trial by Jury.

Now on this day this cause came on regularly for trial, McGowan and Clark appearing for and in behalf of plaintiffs, and Louis K. Pratt appearing in behalf of defendants, and both sides announcing

themselves ready for trial, the following proceedings were had, to wit:

Upon motion of Louis K. Pratt, attorney for defendant, the Court ordered that T. A. Marquam be entered as associate counsel for defendant herein.

Whereupon the clerk proceeded to draw from the trial jury box, one at a time, the ballots containing the names of the members of the regular panel of petit jurors, and the respective attorneys examined said jurors and exercised their challenges against said jurors so drawn, until the ballots were exhausted and the jury was incomplete, said jurors so drawn to try the issues in this cause being as follows, to wit:

Rudolf Alm, F. C. Adams, Wm. Butler, W. W. Elliott, D. G. Ferguson, J. F. Burnett, Frank B. Hall, A. Bjerremark, J. S. Whitman, C. N. Nelson and L. B. Clough.

Whereupon the Court directed the Clerk to issue a writ of special venire, directed to the United States Marshal, commanding him to summon from the body of the District, seven (7) men qualified to sit and serve as jurors in this Court and cause, said venire [10] returnable to-morrow, March 25, 1914, at 10:00 A. M.

The Court admonished the jury and further proceedings continued until to-morrow, March 25, 1914, at 10:00 A. M. [11]

[Minutes of Court—March 25, 1914.]

[Caption and Title.]

Trial by Jury Continued.

Now on this day this cause came on regularly for

continuance of trial, the jurors heretofore drawn to try the issues of this cause being all present, the respective parties and attorneys being present as heretofore, and the following proceedings were had, to wit:

The marshal returned into court the special venire and the members thereof answering to their names as present, the clerk proceeded to draw from the trial jury box, one at a time, the names of the members of said special venire, the respective attorneys exercising their challenges and examining the jurors so drawn until the panel was complete, consisting of the following persons, to wit;

Rudolph Alm,	Frank B. Hall,
C. N. Nelson,	A. Bjerremark,
Andrew Nerland,	J. S. Whitman,
W. W. Elliott,	L. B. Clough,
D. G. Ferguson,	W. E. Kenyon,
J. F. Burnett,	B. F. Pryor,

which said jury was duly sworn to try the issues in said cause.

Opening statement was had by John A. Clark in behalf of plaintiffs.

Upon motion of John A. Clark, the Court ordered that the case be dismissed as to plaintiff's second cause of action.

Statement was had by Louis K. Pratt, attorney for defendant.

Whereupon Edward Williams was duly sworn and testified as a witness in behalf of plaintiff. [12]

Plaintiffs' Exhibit "A," "B," "C," "D," "E," "F" and "G" were marked, offered and admitted in evidence.

The Court admonished the jury and further proceedings were continued until 1:30 P. M., this day.

Thereafter, at 1:30 P. M., the jurors, the respective parties and attorneys being present as heretofore, the trial of said cause was resumed.

Edward Williams resumed the stand and testified further in behalf of plaintiff.

Plaintiff's Exhibits "H," "I" were marked, offered and admitted in evidence.

Defendants' Exhibits "1" and "2" were marked, offered and admitted in evidence.

And it appearing that the jury should be kept together and free from communication, John Solen and L. F. Protzman were duly sworn as bailiffs in charge of said jury during the pendency of the trial of said cause.

The Court admonished the jury and further proceedings were continued until 7:30 P. M., this day.
[13]

[Minutes of Court—March 25, 1914.]

[Caption and Title.]

Trial by Jury Continued.

7:30 P. M.

Now at this time this cause came on regularly for continuance of trial, the jury, the respective parties and attorneys being present as heretofore, the following proceedings were had, to wit:

The deposition of Joseph Eglar was read into evidence by John A. Clark, attorney for plaintiff, the cross-examination thereof was read into evidence by Louis K. Pratt, attorney for defendants.

C. J. Hurley was duly sworn and testified in behalf of plaintiffs.

Plaintiff was granted permission by the Court to put an attorney on the stand later for the purpose of testifying as to reasonable attorney's fees.

Plaintiff rested.

Whereupon Louis K. Pratt, attorney for defendants, moves for nonsuit of said cause, which motion was by the Court denied.

Edwin Richards was thereupon duly sworn and testified as a witness in behalf of defendant.

Court admonished the jury and further proceedings continued until to-morrow at 10:00 A. M. [14]

[**Minutes of Court—March 26, 1914.**]

[Caption and Title.]

Trial by Jury Continued.

Now on this day this cause came on regularly for continuance of trial, the jurors, in charge of their sworn bailiffs, the respective parties and attorneys being present as heretofore, and the following proceedings were had, to wit:

Edwin Richards resumed the stand and testified further in behalf of defendants.

Defendant rested.

By permission of the Court and stipulation of the respective attorneys, A. R. Heilig was duly sworn and testified in behalf of plaintiff.

C. J. Hurley was recalled to the stand and testified further in behalf of plaintiff.

Plaintiff rested. Defendant rested.

The Court admonished the jury and further pro-

ceedings continued until 1:00 P. M., this day.

Thereafter, at 1:00 P. M., the jurors, in charge of the sworn bailiffs, the respective parties and attorneys being present as heretofore, the trial of said cause was resumed.

After opening arguments by John A. Clark in behalf of plaintiff, and T. A. Marquam in behalf of defendants, and closing arguments by Louis K. Pratt, in behalf of defendants, and Thos. A. McGowan in behalf of plaintiffs, the Court instructed the jury as to the law in the premises, and John Solen and L. F. Protzman were again sworn as bailiffs in charge of said jury, whereupon said jury retired in charge of said bailiffs to deliberate upon their verdict. [15]

5:30 P. M.

And now come into court the jury heretofore sworn to try the issues in this cause in charge of their sworn bailiffs, and being called, all answered to their names as present; also present Thos. A. McGowan and Louis K. Pratt, attorneys for plaintiff and defendants respectively; and the jury, by and through their foreman present, in open court, their verdict in said cause, which is in the words and figures following, to wit:

[Verdict.]

[Caption and Title.]

We, the jury duly impaneled and sworn to hear, try and determine the issues in the above-entitled action, do find in favor of the plaintiff and against the defendants Edwin Richards and Edward Williams, copartners as Richard & Williams and the defendant Edwin Richards, and do find that there is

now due and owing and unpaid from said defendants to plaintiff the sum of \$3,500.00 principal, due on the note sued on in the above-entitled action, together with no interest thereon, together with an attorney's fee for plaintiff's attorneys in the sum of \$750.00.

Dated March 26th, 1914.

L. B. CLOUGH,
Foreman.

—which said verdict was received by the Court and ordered filed with the clerk of this court, and the jury was discharged from further deliberation in this cause. [16]

[Minutes of Court—April 14, 1914.]

[Caption and Title.]

Hearing on Motion for New Trial.

Now on this day came on for hearing defendant's motion for a new trial herein, John A. Clark, of McGowan & Clark, appearing for and in behalf of plaintiff, Louis K. Pratt and T. A. Marquam appearing for and in behalf of defendants. After argument thereon by the respective attorneys, the same was submitted to the Court and decision thereon was reserved until a later date. [17]

[Minutes of Court—April 18, 1914.]

[Caption and Title.]

Order Denying Motion for New Trial.

Now on this day defendants' motion for new trial herein having been previously heard and submitted to the Court for its decision, John A. Clark, of Mc-

Gowan & Clark, in behalf of plaintiff, and Louis K. Pratt, in behalf of defendants, being present in open court; and the Court being fully and duly advised in the premises,

IT IS ORDERED that the motion for a new trial herein, be, and the same is hereby denied. [18]

[Caption and Title.]

Judgment.

The above matter coming on regularly for trial, upon March 24, 1914, before Hon. Frederic E. Fuller, Judge, sitting with a jury, the plaintiff appearing by and through C. J. Hurley, its president and its attorneys, Messrs. McGowan & Clark, the defendant, Edwin Richards appearing in person and by and through his attorneys, Louis K. Pratt and Thos. A. Marquam, Esqs., and the defendant, Edward Williams, appearing in person as a witness, not being represented by counsel, and his default having been duly and regularly entered, as prescribed by law; and a jury having been duly impaneled and sworn to try the issues of said cause, and oral and documentary evidence having been introduced in behalf of the respective parties, and the trial of said cause having been continued from day to day until March 26, 1914; and said case having been closed and the issues argued to the jury by the attorneys for the respective parties and the Court having instructed the jury in regard to the law applicable thereto, and said jury having retired to deliberate and thereafter having returned into court, on March 26, 1914, and

rendered their verdict, which is in words and figures as follows, to wit:

“We, the jury duly impaneled and sworn to hear, try and determine the issues in the above-entitled action, do find [19] in favor of the plaintiff and against the defendants, Edwin Richards, and Edward Williams, copartners as Richards & Williams, and the defendant Edwin Richards, and do find that there is now due and owing and unpaid from said defendants to plaintiff the sum of thirty-five hundred dollars principal due on the note sued on in the above-entitled action, together with no interest thereon, together with an attorney’s fee for plaintiff’s attorneys in the sum of \$750.00.

Dated March 26th, 1914.”

which said verdict was duly received and filed and entered, in the manner prescribed by law; and the defendant, Edwin Richards, having thereafter, and within the time prescribed by law, filed a motion for new trial, and said motion having been duly argued and submitted to this Court and denied; and it further appearing to this Court that after the institution of the action certain real and personal property belonging to defendant Richards was attached at the instance of plaintiff and that said attachment has never been set side; and all and singular the law and the facts being fully understood and considered, and the Court being fully and duly advised in the premises, now, upon motion of Messrs. McGowan & Clark, attorneys for plaintiff,

IT IS ORDERED, ADJUDGED AND
DECREEED:

1. That the plaintiff have and recover from Edwin Richards and Edward Williams, copartners as Richards & Williams, and from the defendant Edwin Richards, as an individual, the sum of thirty-five hundred dollars (\$3500.00), together with an attorney's fee in the sum of seven hundred and fifty dollars (\$750.00):

2. That plaintiff have and recover from the defendant, Edward Williams, as an individual, the sum of thirty-five hundred dollars (\$3500.00), together with interest thereon from February 24, 1911, to date, at the rate of twelve per cent (12%) per annum, amounting to the sum of Thirteen Hundred Twelve and 50/100 Dollars, and an attorney's fee in the sum of Seven Hundred and Fifty Dollars (\$750.00):

3. That the plaintiff have and recover from the defendants, [20] Edward Williams and Edwin Richards, copartners as Richards & Williams, and Edwin Richards and Edward Williams, as individuals, the costs of this suit, to be taxed by the clerk; and

4. That the attachment lien of plaintiff on property of the defendant Richards be foreclosed and the property so attached sold by the United States Marshal in the manner prescribed by law, and the net proceeds thereof, or as much thereof as may be necessary, applied by said United States Marshal as a payment upon the judgment above rendered.

Done in open court this 20th day of April, A. D. 1914.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 909.

Due service of the within judgment and receipt of a copy thereof are hereby acknowledged this 20th day of April, 1914, form not objected to.

LOUIS K. PRATT & SON and
THOMAS A. MARQUAM,
Attorneys for Deft. Richards.

[Endorsed]: No. 1815. In the United States District Court, Territory of Alaska, Fourth Division. American Bank of Alaska, Plaintiff, vs. Edward Williams et al., Defendant, Judgment. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 20, 1914, Angus McBride, Clerk. By P. R. Wagner, Deputy. [21]

[Minutes of Court—March 27, 1914.]

[Caption and Title.]

Now on this day, upon motion of Louis K. Pratt, attorney for defendants, John A. Clark, attorney for plaintiff, being present and consenting thereto,

IT IS ORDERED that the plaintiff herein have sixty (60) days within which to prepare, file, and have settled a bill of exceptions herein.

It is also ORDERED that the bond on Appeal herein be, and the same is fixed at seven thousand dollars (\$7,000). [22]

[Minutes of Court—May 23, 1914.]

[Caption and Title.]

Order Extending Date for Filing and Settling Bill of Exceptions.

Now, on this day, on motion of Louis K. Pratt, attorney for defendants, Thos. A. McGowan, attorney for plaintiff, not objecting thereto,

IT IS ORDERED that the time within which to file and settle Bill of Exceptions be, and the same is hereby extended to and including June 26, 1914.
[23]

[Caption and Title.]

Bill of Exceptions.

BE IT REMEMBERED that this action came on regularly for trial before Honorable Frederic E. Fuller, Judge, at 10 o'clock A. M., on Tuesday, March 24, 1914. A jury of twelve men, having been sworn and examined on *voir dire* and accepted by the respective parties, were duly sworn and empaneled as the jury to try the case. Louis K. Pratt & Son and Thomas A. Marquam appeared as attorneys for answering defendant Richards, and Messrs. McGowan & Clark as attorneys for plaintiff. Mr. Clark made an opening statement on behalf of plaintiff, and Mr. Pratt an opening statement on behalf of defendant Richards, whereupon the following proceedings were had and testimony was taken:

[Testimony of Edward Williams, for Plaintiff.]

EDWARD WILLIAMS, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

“My name is Edward Williams. I am one of the defendants in this action. I am well acquainted with Mr. Richards, have known him ten or twelve years intimately. I have worked a good deal for Mr. Richards. In the early part of September, 1910, I was on Cache Creek in the Hot Springs District. I had been working for Mr. Richards, the defendant in this action, that summer. Earlier in the year I received a letter from a man named [24] Boulton in the Iditarod. I don't know whether I showed that letter to Mr. Richards for him to read, I couldn't say, but we discussed the letter. I had known Mr. Boulton as long as I had known Mr. Richards. I couldn't say the exact number of years. I remember the receipt of a telegram by Mr. Richards in the latter part or middle of September, 1910. (Telegram handed to witness.) This is the telegram.”

Mr. CLARK.—We ask to have this introduced in evidence as Plaintiff's Exhibit “A.”

The COURT.—It may be admitted.

(Marked Plaintiff's Exhibit “A,” and read to the jury.) [25]

Plaintiff's Exhibit "A" [Telegram, Dated September 12, 1910, John Boulton to Dick Richards].

SIGNAL CORPSE, UNITED STATES ARMY.
TELEGRAM.

RECEIVED AT

23

2 GI N Z 23 Paid

1

Kaltag Als Sept 12th/10.

Dick Richards,

Hot Springs Als

Send two thousand at once, through N C fifty thousand at stake twelve dollars foot. Freeze out game don't fail see letter. answer.

JOHN BOULTON.

7 15 PM

[Indorsed]: #1815. Pltffs. Ex. "A." Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

"Mr. Richards got that telegram at Cleveland's and Howell's on Cache Creek. I was staying in his cabin at the time. He got the telegram over the phone. It was telephoned from Hot Springs. After he came home to the cabin, Mr. Richards and I had a conversation with reference to the telegram. I couldn't just state what the character of the discussion was. We talked the matter over and I think he knew something about the matter—the contents of the letter I had received from Boulton earlier in the

(Testimony of Edward Williams.)

season—because at the time I received the letter there was a friend of mine and of Mr. Richards going to the Iditarod, and I think Mr. Richards phoned to him to have him look the proposition up. That night, after receiving this telegram, Mr. Richards and I may have discussed it about me going down there, but I couldn't say for sure." [26]

A. Yes, sir. We passed our remarks about him, what kind of a boy he was. I always thought he was all right, and I spoke pretty favorably of him. I had no money. Mr. Richards knew that. I had been working Richards' ground there, that summer, and I was in debt to Mr. Richards at the time, and he knew it, that my partner and I were in debt to him at the time.

Q. Was there anything said that night about you going down to the Iditarod?

A. Yes. We discussed it, but I can't say just what the nature of the conversation was.

Q. Was there anything definite agreed upon that night?

A. No, I don't think there was anything definite.

Q. What happened next in regard to you going to the Iditarod? What did Mr. Richards do?

A. He gave me a check for \$2,300.00 and \$200.00 in currency.

Q. When was that done?

A. I think the following morning.

Q. Where did it happen? A. On Cache Creek.

Q. What was the conversation at the time this

(Testimony of Edward Williams.)

money was given to you and what was agreed between you in regard to what you should do with it, or where you were to go?

A. I was supposed to go down there and use my own judgment.

Q. What were you to do with the money when you got there? Were you to keep it, or buy something?

A. Oh, I was supposed to make a purchase. I was to use my judgment, in reference to any transaction.

[27]

Q. If you purchased anything, what were you to do with it? A. Work it, I suppose.

Q. Was there anything said between you and Mr. Richards in reference to what would be done with any profits from anything that you purchased?

A. No, sir.

Q. He just gave you the \$2,300.00 draft or order, and \$200.00 in currency? A. Yes.

Q. Was that order given there on Cache Creek, or given in Hot Springs?

A. I claim it was given on Cache Creek.

Q. What was it in the nature of—was it a paper that was given to you?

A. It was a check that Mr. Richards issued to me.

Q. A check on what?

A. On whatever bank it was that Mr. Richards transacted his business with.

Q. Was it a check on a bank in the Town of Fairbanks?

A. I couldn't say whether it was payable at the N. C. in Fairbanks for sure, or a bank in Fairbanks,

(Testimony of Edward Williams.)

because Richards at that time hadn't the amount of money that he required, that is, had it in the bank here at the time.

Q. What happened with that check after you received it—what did you do?

A. I turned it over to Mr. Richards again at Hot Springs.

Q. About when was it after the telegram was received? A. It must have been a day or two.

Q. What happened when you turned it over to the N. C. or to Mr. Richards at Hot Springs?

A. I got a letter of credit from the N. C. Company.

Q. On what station? A. On Iditarod.

Q. For how much? A. \$2,300.00. [28]

Q. Did you have any other conversation, between the time the telegram came and the time you left Hot Springs, with Mr. Richards about what was to be done when you got to the Iditarod?

A. No. I remember Mr. Richards saying in the store, he said this: "If there is no confliction with that ground, we will go stronger than that."

Q. That was how long before you took your departure?

A. That was in the evening, quite late in the evening, because I pulled out at 4 o'clock in the morning.

Q. How did you pull out?

A. Mr. Richards had hired a young man by the name of Sam Campbell to row me to Gibbon.

Q. You went in a small boat?

A. Yes, he hired him, and paid his way there and back.

(Testimony of Edward Williams.)

Q. You say Richards had engaged that boat?

A. Yes, sir.

Q. Who paid for the hire of the boat?

A. Richards.

Q. Between the time the telegram came and the time you left, did you discuss anything further about this Boulton lay, or any other proposition, in the Iditarod?

A. No more than we talked the matter over. We couldn't say much more about it, because what information we had was rather limited, you know. We didn't know. In the meantime I had heard some information from a fellow down there by the name of Merrifield.

Q. State whether or not Mr. Richards knew you had gone to see Merrifield. A. Yes, sir.

Q. Tell what happened in connection with seeing Merrifield. [29]

A. He says: "We will go down town and see him." And I walked down to Tofty that night, and I goes to see Merrifield.

Q. Was that the night the telegram came, or the next night, or when?

A. That I couldn't state positively.

Q. And you went down town. A. Yes, sir.

Q. That was at Tofty. A. Yes.

Q. Did you see Merrifield? A. Yes, sir.

Q. What did Richards say about seeing Merrifield? What were you going down to see him for?

A. I was going down to find out something about that ground.

(Testimony of Edward Williams.)

Q. Had Merrifield been in the Iditarod?

A. Yes.

Q. Go ahead. Did you see Merrifield?

A. Yes.

Q. Did you have a talk with him? A. Yes.

Q. Was Richards present at the time?

A. No, sir.

Q. After having that talk with Mr. Merrifield, did you come back and talk with Richards?

A. We came home together that evening from Tofty, and I talked the matter over with Mr. Richards.

Q. What, if anything, did you tell Mr. Richards in regard to what Merrifield had told you?

A. That it looked very favorable; that he had a good thing down there.

Q. Did Merrifield know anything about the Boulton lay? A. Yes. He had been on the creek.

Q. How long after that was it that you went to Hot Springs?

A. Well, now, I can't just state, because Richards went to Hot Springs before me. And I was at Tofty when I received the telephone from Richards telling me that if I could get to Gibbon on a small boat I could catch the Susie or Sarah, I don't remember which one. [30]

Q. How long after you got that telephone message from Richards did you get to Hot Springs?

A. The next morning.

Q. Can you tell how long it was between the time the telegram was received and the time you went to

(Testimony of Edward Williams.)

Hot Springs to take the small boat?

A. No, I could not, positively.

Q. Was anything said about Mr. Richards going down to Iditarod?

A. No, not to my knowledge; no more than he might have said he was too busy to go himself—something to that effect.

Q. I will ask you this: Did you borrow the money from Mr. Richards? A. No, sir.

Mr. CLARK.—Q. Was there anything further said between you and Richards in regard to what would be done with any property that you might acquire?

A. No, sir.

Q. You say you left in a small boat.

A. Yes, sir.

Q. Did you catch one of the packets at Gibbon?

A. Yes, sir.

Q. When did you reach the Iditarod?

A. The latter part of September—the very latter part of it.

Q. What did you do with the money that you took down with you?

A. I took my letter of credit to the N. C. and got my money.

Q. Then what did you do with the money?

A. I first took it to the Miners & Merchants' bank.

[31]

Q. How did you deposit it there?

A. In my own name, I think, there.

Q. Did you make any investigations of the Boulton lay there—after?

(Testimony of Edward Williams.)

A. Yes, sir. I went out to the creeks and looked the matter over.

Q. Did you come back to Iditarod after that time and have any conversation with Mr. Hurley, after you had been out to the creeks?

A. I wasn't acquainted with Mr. Hurley at that time.

Q. How did you happen to meet Mr. Hurley?

A. Through Mr. Morgan.

Q. Was that Mr. Morgan formerly of the firm of Morgan & Litsey? A. Yes.

Q. How did it chance that you met Mr. Hurley through him?

A. Well, I had been discussing my purposes with Mr. Morgan, and I told him—previous to that time, I had had a conversation with Mr. Linderberg, the manager of the Miners & Merchants' Bank, and of course I asked him—(interrupted). (Objected to as hearsay.)

Q. Did Mr. Morgan, as the result of that conversation, take you over and introduce you to Mr. Hurley? A. Yes, sir.

Q. What if anything, did you request of Mr. Hurley?

A. Well, I told Mr. Hurley what I wanted to do; that I wanted to buy a half interest in the Boulton lay, or a three-quarters interest—in fact, I bought three-quarters, but I bought the half first.

Q. How much was the purchase price of the half to be? A. \$4,500.00.

Q. How long after that did you buy the other

(Testimony of Edward Williams.)

Q. What, if anything, did you tell him in regard to whose money it was?

A. I told him it was Mr. Richards' money.

Q. What, if anything, did you do in the way of opening an account, in whose name?

A. I started in an account—(interrupted). [34]

Mr. PRATT.—I object as incompetent and irrelevant. There is no *prima facie* showing of a mining copartnership that would authorize evidence either of direct declarations or of conduct such as to make a deposit in that name—in the name of a supposed partnership firm, that would be a basis for that. (Objection overruled. Plaintiff excepts; and exception allowed.)

M. CLARK.—Q. How did you open the account?

A. Richards & Williams.

Q. How much money did you first deposit?

A. Not including the loan?

Q. Yes, without the loan.

A. I think I deposited \$2,000.00 or \$2,100.00 with Mr. Hurley at that time.

Q. Then you say you made a loan. A. Yes, sir.

Q. Did you sign a note for it at the time?

A. I did, sir.

Q. Have you seen that before? (Hands a paper to witness.) A. Yes.

Q. Is that the note that you signed at that time?

A. Yes.

Mr. CLARK.—We offer it in evidence.

Mr. PRATT.—We object to that as irrelevant, incompetent, immaterial, not tending to prove any of

(Testimony of Edward Williams.)

the issues in this case. Here is a note dated October 6, 1910, for \$3,500.00. It is signed Richards & Williams, for Ed Williams. We are willing to concede that is the same money, undoubtedly, or part of it would be the same money that would be represented by the note in action. There is no question about that, I suppose.

(Objection overruled. Defendant excepts. Exception allowed.)

(Note marked Plaintiff's Exhibit "B" and read to the jury.) [35]

**Plaintiff's Exhibit "B" [Promissory Note, Dated
October 6, 1910, Richards & Williams to Amer-
ican Bank of Alaska].**

(Note)

No. 62. Due Jany. 6/11

Fairbanks, Alaska, Oct. 6, 1910.

\$3500.00

On or before Ninety (90) days after date I promise to pay to the order of AMERICAN BANK OF ALASKA, at its office in Fairbanks, Alaska, Thirty five hundred no/100 dollars for value received, with interest after date at the rate of twelve per cent, per annum until paid. Principal and interest payable only in U. S. Gold Coin of the present standard of weight and fineness. For value received, each and every part signing or endorsing this note hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety, and promises in case suit is instituted to collect the same or any portion there-

(Testimony of Edward Williams.)

of, to pay such additional sums as the court may adjudge reasonable as attorney's fees in such suit.

RICHARDS & WILLIAMS,

Per ED WILLIAMS.

Note stamped on face in blue ink as follows:

American Bank of Alaska

Feb 25 1911 PAID

Iditarod Branch.

[Indorsed]: #1815. Pltffs. Ex. "B." Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [36]

Mr. CLARK.—Q. Now, after that note was given, what, if anything, did you do towards securing the money? What was done with the money that was secured at that time?

A. Well, there was considerable debts in connection with the ground.

Q. Did you use it? A. Certainly.

Q. Did you draw checks against the account?

A. Yes, sir.

Q. I show you this and ask you if you have seen it before? (Hands a paper to witness.)

A. Yes, sir.

Q. Is that the way checks were signed against the account? A. Yes, sir.

Mr. CLARK.—We offer this in evidence.

Mr. PRATT.—We object to that as incompetent, irrelevant, does not tend to prove or disprove any of the issues in this case. It must be offered as a declaration of this party that Richards was his part-

(Testimony of Edward Williams.)

ner. It is signed Richards & Williams, per Ed Williams.

The COURT.—I take it that that *it* is not the purpose, but that it is to show the transaction. Objection overruled.

(Defendant excepts. Exception allowed. Marked Plaintiff's Exhibit "C," and read to the jury.) [37]

Plaintiff's Exhibit "C" [Check, Dated December 5, 1910, Richards & Williams to John Lund].

IDITAROD, ALASKA, Dec. 5th, 1910.

No. ———

AMERICAN BANK OF ALASKA.

Pay to the order of John Lund \$70.00 Seventy Dollars.

RICHARDS & WILLIAMS.

Per ED WILLIAMS.

Marked on face in blue ink stamp:

American Bank of Alaska.

PAID Dec 5 1910

Iditarod, Branch.

Indorsed as follows:

John Lund

William Casey Per B. L. Morris.

[Indorsed]: #1815. Pltffs. Ex. "C." Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [38]

Mr. CLARK.—Q. That check that was introduced in evidence payable to John Lund, what did that money represent?

(Testimony of Edward Williams.)

A. We had a drill on the ground—the boys had.

Q. Was that part of the consideration of the purchase— A. Certainly.

Q. —the payment of that debt, or had that been contracted before?

A. It was one of the debts that I assumed when I made the purchase.

Q. I show you a bundle of checks (hands papers to witness), and ask you if those checks were signed by you. A Yes, sir; those were signed by me.

Mr. CLARK.—We offer those checks in evidence, showing the manner of the signature in connection with this transaction.

Mr. PRATT.—We object to these as evidence in this case for this reason: They are evidently—when they bought that lay from Boulton and the interest from the other two men, Kennedy and Shively, they had a lot of debts there, and, instead of paying the money directly to them, he paid their creditors; and these are the checks, and that was the testimony before, but it don't signify anything.

Mr. CLARK.—With that statement and stipulation, we withdraw them.

Q. After you gave this note that has been introduced in evidence as Plaintiff's Exhibit "B," did you write a letter to Mr. Richards? A. Yes, sir.

Q. I show you this letter, and ask you if that is the letter. (Hands paper to witness.)

A. That is the letter.

Mr. CLARK.—We offer it in evidence, dated October 24, 1910.

Mr. PRATT.—No objection.

(Marked Plaintiff's Exhibit "D," and read to the jury, which exhibit is in the words and figures following, to wit:.) [39]

Plaintiff's Exhibit "D" [Letter, Dated October 24, 1910, Ed. J. Williams to Edwin Richards].

Flat Creek, Oct. 24th, 1910.

Friend Dick:

You will no doubt think you are never going to hear from me, but conditions with regards to the mail service are rotten, and to try and get a wire to you was out of the question, so I decided to use my own judgment and do the best I possible *good* and I hope when you have read this letter that its contents will cause you no worry.

I arrived at Twilight City Sept. 27th, and found Jack waiting for me. We left the next day for the Creek to look over the situation. In the first place I got acquainted with two of the owners at Dikeman on their way outside, and I got busy asking questions about the lay. They spoke very favorable of the proposition, telling me to look over the proposition and satisfy myself. They also said they would like to see Jack make money as he was the first one to locate the pay. I made it a point to see all the owners before to find out if they would consent to the transfer of the lease before I commenced talking business to Jack and his partners. As they did not agree to the transfer of Dave Johnson lay to Doc Madden without a consideration of \$6,000 which he paid, making a total of \$46,000 which he paid for the thousand feet.

I had no difficulty in getting the consent of all the owners. I then commenced looking into Jack's condition of affairs. I discovered nothing of a complicated nature. In fact, Jack had the whole thing in his name. He had mortgaged his half to make a payment which his partners could not meet for \$1500. There was also a great many small debts amounting to about \$2,000.

Now, Dick about the ground. It is undoubtedly good ground, yet I think Jack exaggerated when he stated \$12 to the foot, but the \$50,000 stake. I don't think he did, for I honestly believe the ground will yield \$150,000. I may be wrong and to make a long story short I purchased ($\frac{3}{4}$) three-quarter interest in it for \$6,500. It is a 75 per cent lay 520 feet up and down stream and 1320 feet across.

I must now enlighten you in regards to the way I made the deal. In the first place, the money I had was hardly a starter. Jack had half interest, his two partners the other half. I paid \$4,500 for *there* half, and Jack \$2,000 for a quarter. I assumed all the debts of the half and paid them \$1775.75, \$887.75 cash and the balance in four months time. Also *there* share of the debts which amounted to \$1225.00, the most of which I have paid. Also the mortgage of \$1500 making a total of \$4500. I have only paid \$500 on the mortgage at the time writing. [40]

I have also paid Jack share of the debts \$778. Also \$350 in Cash and the balance \$872 when we can. Now Dick how I got the money is the hardest part for me to tell. You may be angry, but I did not do it with any selfish motive or trying to take advantage of the

kindness you did for me; yet if I had have received you letter, which I got 4 days ago, I don't think I would have bought it, but it was too late.

I deposited the money in the American Bank of Alaska. Mr. Hurley is the manager. I told him the money was yours. He told me in case anything should happen me unless I deposited in yours and my name, you would have some trouble getting it, so I did as he advised, and signed the cheques, Richards & Williams. Now, Dick, I had to have more money. I first goes to the Merchant and Miners Bank and tried to do business with them. He offered to place to my credit dollar for dollar to the amount of \$10,000. That is I would deposit \$5,000, he would give me credit for \$10,000. I couldn't see my way clear to make that transaction, as he wanted a mortgage on the loan and the owners did not care at that time to agree to mortgaging the lease.

So I goes to the American Bank of Alaska and borrows (\$3,500) for 3 months at one percent, with the understanding that it is to be renewed if it is not convenient to pay when due (90) days.

Now, Dick, I had to sign the note Richards & Williams, and I sincerely hope you wont be offended, and I give it to you my word, also Jack's that every dollar we put into the ground purchasing price included, come out of the ground before he get one dollar. It is a proposition you can't loose on. If you don't make \$20,000 out of it I will miss my guess.

You say you want to be on the ground yourself and I assure you I want you to come down; in fact, you have got to come as it requires money to do business

in this camp. It requires heavy machinery as the top has got to be scraped off 6 or 7 ft. of it. It is from 16 ft. to 18 ft. to bedrock. It is hard ground to sluice. They dump it on to almost a flat apron and use a nozel on it from a two or three inch pump which they keep in the cut sufficient to keep out the water. The ground is all thawed. You will *after* pump there is lots of water but can't get up high enough to get good tailing room. Wood is very high, it will cost from 12 to 15 a cord on the claim. So you can see why you should here.

I bought a 40 H P boiler from T. Aitken, \$2200, \$700 down and gave my note for the balance. I did not use your name on the note. It is due the 1st of June. Now, Dick, my money is getting pretty low, that is, I have no money to do business with, such as machinery and wood. That is the reason I want you to come down. I know Dick this proposition places you in rather an awkward position and I sometimes wish I had never gone into it when I think of the position it places you in. It will mean at least 2 years work on this ground alone, but what of it, Dick, when it is a sure thing? [41]

I have lots of grub for the winter and a nice cabin on the ground and the lumber and boxes on the lay cost about \$250. Jack is leaving to-morrow for the upper Iditarod with a prospecting outfit, intending to stay for the winter. He don't want anything to say about the working of the layout. He wants you to take it and do what you like. I will be all alone. Will find a little work to do cutting brush out on the claim and may pick up 30 or 40 cords of wood.

Tom Burns as the lay below—he 1000 ft. 70 per cent Strandberg Brothers $\frac{2}{3}$ lay of Ester next, Henderson who used to haul wood on Dome next, G. Friend 60 percent next, Ronan and Monckmon (60 percent) next. Above me is a 500 ft. lay which could be bought. They are asking \$15,000 for it. They have been offered \$11,000 for it. Then the Gugg, Dave Johnson, D. Madden, T. Aitkens. It is reported Aitkens took out \$200,000. Dr. Madden \$170,000, The Guggs were hoisting 1000 a day or better so the owners to the ground told me with a small crew. This so you can judge for yourself how this proposition looks to me.

Now, Dick, whatever I have done I hope will meet with your approval, as I want to do what is right by you.

I am in town—have been in for a day or two getting an outfit for Jack and getting the Bill of sale for the $\frac{3}{4}$, have it made out to you and me, which I hope will be satisfactory.

Mr. Aitken will call on you and explain the conditions in this camp and will enlighten you a good deal.

Tom Williams is over on the Kuskerwin prospecting. Shorty Greggan also. I saw him a few days ago. He has nothing fat. John Johansa Earn are both hear, not doing any think.

I must now close hoping to hear from you or else see you in the near future.

Sincerely yours,

(ED. J. WILLIAMS),

Flat Creek, Iditarod, Alaska.

(Testimony of Edward Williams.)

Envelope addressed as follows:

Edwin Richards Esq,

Cash Creek, Alaska.

On corner: From E. J. Williams,

Iditarod, Alaska.

(Marked as registered.)

[Indorsed]: #1815. Pltffs. Ex. "D." Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [42]

Mr. CLARK.—Q. Now, after writing that letter to Mr. Richards, did you receive any reply?

A. Yes, sir.

Q. First, however, did you send the letter away by registered mail? A. I think I registered it.

Q. Is that the envelope in which you sent it? (Producing.) A. It is.

Mr. CLARK.—We ask that this be introduced as a part of the letter and exhibit.

Mr. PRATT.—That is all right.

Mr. CLARK.—Q. I ask you to examine that letter (handing same to witness) and state whether or not that is the reply you received to the first letter that has just been introduced in evidence.

Mr. MARQUAM.—What is the date of that?

Mr. CLARK.—December 8th. Q. Is that the letter?

A. Yes. I received that letter.

Mr. CLARK.—We offer it in evidence.

The COURT.—It may be admitted.

(Letter marked Plaintiff's Exhibit "E" and read

to jury, which exhibit is in words and figures following, to wit:) [43]

Plaintiff's Exhibit "E" [Letter, Dated December 8, 1910].

Taft, Alaska, Dec. 8th, 1910.

Friend Ed:

Received your registered letter last night, 7th, and other two letters Monday night, 5th. I would have answered them on the return mail, only when you address to Hot Springs, the letters go there first. They should be addressed to Taft from that direction. I was rather surprised on reading your letter. You are going some, I did not see T. Aiken. I heard he went past here 2 weeks ago, so I called him on the phone at Hot Springs. He told me you purchased 1/2 interest in the lay, and he thought it was good ground, asked me if it would be all right about some money due first of June, so I told him I didn't know a thing about anything, as I had no word whatever. He thought I would have been informed about it and that was all. As I said I was surprised as its been so long since you left I would have knowed something before. First of all, I want to ask you, as you say nothing about it, is that 5.00 or 8.00 ground located on that lay. I never heard it was a yet, neither on that lay above. They surely would buy that as well as Dave Johnson's lay if they could show the goods. I hope you have it there. Regarding coming down there, you know Ed that I paid cash for ground here before you left, and it would be almost impossible for me to leave this place, unless I was rid of everything I have here, and if I came

down there to work ground, I would certainly bring my machinery down. I couldn't go to work and buy machinery there while I have this on hand, and besides I have contracted 300 cords of wood and over, and partly paid for, which means over \$2,000. You, Dan and Jack should certainly be able to work that ground. I realize you have put yourself under considerable obligations. What on earth did you make all them due in three and four months, come due in the heart of winter, when there is no possibility to raise a dollar. Regarding that account at the Bank in both our names, that is certainly a mistake. When I gave you a check for the money and you gets a letter of credit on it, my name should not be used at the Bank. I never had the least idea you should assume any obligations beyond what would relieve the situation and what Jack called for at the time, and now when I see Jack gets some of the money himself and takes to the woods. And whatever became of that letter he was sending, never showed up here as yet. Well, now Ed to make this short, I believe the best way out of this, you should try and get some of them moneyed fellows down there to go in with you. Consider me out of it altogether. Doubtless you should have no trouble in doing business with that kind of ground, and with people there that knows it. I figure I have as much at stake here, although I may have nothing, but it's certainly easier for many of them to leave Hot Springs than me, and also I am having a little anxiety regarding my head. I don't know but there's a head datch or something remaining and am liable to be required to seek med-

ical aid any time, so it wouldn't do for me to be there. There is a mail leaving in the morning and I must take this to Kelly to-night, so I am sending at the earliest possible. [44] I don't know how long it will be getting there. I realize Ed that you mean all right, and I sincerely hope you will make out all right. When I said I would like to be on the ground myself, I meant it, in so far when it requires so much expense to start, as it seems to there. At the same time I had no thought of coming down there, at the time, as I thought you and Jack capable of working any ground if you try, but after I talked with several from there after you left, I did not think you would go into it, as I haven't seen anyone knew that Jack had pay outside of Dolar and half to foot ground and that wouldn't be worth working in that country. So I went ahead contracting obligations here, and must stay with it. If you manipulate another deal, it would be better for you to have the Bill of Sale made over from the old laymen. I sincerely hope you'll make out all right. You are perfect welcome to use that money until you can make it. There is nothing new here. There was a small find made out on a creek near Fish Lake by Tom Lockhead. Gus is down prospecting with Patten. They are getting some prospects. I have my fifth hole near down at mouth of Dalton, but haven't anything as yet. Dick Morris and partners sold out to Howell. Dutch is taking out a dump on the Eureka. Will enclose. Kindly let me know if you make out all right. It seems to me you could easily make some transaction to advantage on that kind of ground. I don't care to go any more. In

(Testimony of Edward Williams.)

fact I can't at present and the only way I would do any more would be bringing my plant down. I wouldn't think of buying machinery. With sincerest wishes for success.

Yours, DICK.

[Indorsed]: No. 1815. Pltffs. Ex. "E." Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. March 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [45]

Mr. CLARK.—In your letter that you wrote on October 24, you state that you probably would not have gone in if you had received his letter which you state you had received four days before. I show you this letter (handing same to witness), dated September 21st, and ask you if that is the letter you referred to in the letter you wrote to Mr. Richards.

A. I received that from Mr. Richards.

Q. Was that the one that you referred to that you had received four days before you wrote the one of October 24th?

A. Allow me to see it again. (Letter handed to witness.)

Q. In your letter of October 24th, you said you probably would not have gone as strong if you had received his letter before you made the loan. What I want to know is: If this is the letter that you referred to.

A. I couldn't say whether that is the letter or not; whether it is a reply to that one or not.

Q. That is September 21st. What date did you leave Hot Springs?

(Testimony of Edward Williams.)

A. It was the 27th when I got to Twilight City. It must *have about* the 18th or 19th.

Q. Is that a letter that you received from Edwin Richards? A. Yes, sir.

Mr. PRATT.—We object, because he can't identify it that way. It is incompetent and immaterial.

The COURT.—It speaks for itself.

Mr. MARQUAM.—It may speak for itself, but that does not identify it as the letter that Mr. Williams referred to in that letter that has been introduced.

The COURT.—It may be admitted.

(Defendant excepts; allowed. Letter marked as Plaintiff's Exhibit "F," and read to jury.) [46]

Plaintiff's Exhibit "F" [Letter, Dated September 21, 1910].

Fairbanks, Alaska, Sept. 21st, 1910.

Dear Ed.

Have met people on the Str. coming to Fairbanks, and others after arriving here, and from what I learn, Jack has a promising lay on the Wildecat, but from what they all say, its in a complicated condition. He has partners, several complicated transactions has occurred, and I don't believe its advisable for us to go into it. We couldn't get no interest of any value, and its going to take a good deal more money to handle it than what you have, possibly not now, but in the future he will have to get big machinery to work it, and I don't care to go into it that steep, unless I could be on the ground to attend operations

myself, so if you have not interested yourself in it by the time you get these lines, I would advise you to call it off as far as I am concerned. Keep enough money to secure yourself, and return balance to my credit at N. C. Hot Springs, through a draft like you had. I will let you know how things is looking on the lay, if I can get word off on some Str. after I get back to the Springs.

Johnie Johanson who is bringing this letter is coming down, I believe Jack exaggerated his telegram considerable, as regard 12.00 to foot. From all these people I've seen 7.00 is about the best there is anywhere on Flat so far, and as far as his lay is concerned he has nothing located to compare with those figures. But if you have already invested anything in it, I trust you have investigated all those complicated transactions that lay has underwent. Otherwise we will be in lawsuits head over heels. Of course 7.00 ground is good enough for anybody at that, and what I learned from others is not to be depended on. You will learn the facts better right there on the ground far better than I can, so can use your own judgment accordingly. I sincerely hope that Jack has his affairs in far better shape than what I learn. He surely deserves better success after trying so hard. Convey best regards to all the boys, and will try and get a few words off after I get to Springs. Am going back to-morrow.

Wishing you good success, will remain,

Yours,

DICK.

(Testimony of Edward Williams.)

[Indorsed]: #1815. Pltffs. Ex. "F." Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [47]

Mr. CLARK.—Mr. Williams, did you receive this letter before or after you made the borrow from the American Bank of Alaska of the \$3500?

A. That letter I received after I had made the borrow.

Q. How long after you borrowed the money?

A. I don't know just exactly.

Q. How long does it take mail usually to go from *Fairbanks* to Iditarod? Say, in the winter of 1910?

A. About thirty days. We had a monthly service there.

Q. Do you remember the date you received it?

A. No. I can't recollect.

Q. After you had received that first letter from Mr. Richards dated the 8th of December, 1910, did you receive another letter from him dated in the same month? (Hands letter to witness.)

A. I received that letter.

Mr. CLARK.—We offer this letter in evidence.

The COURT.—If there is no objection, it may be admitted.

(Letter marked as Plaintiff's Exhibit "G" and read to jury.) [48]

Plaintiff's Exhibit "G" [Letter, Dated December 26, 1910].

Tafty, Hot Springs, Alaska, Dec. 26, /10.

Friend Ed:

Rec'd your note yesterday, Xmas day. Regret to note your discern me to doubt your honesty, which I sure don't or ever meant anything to convey that impression. What bothered me was to have these fellows come after me for the money which I did not know anything about. Regarding your going down there I don't understand why you would be sorry about. Trust you had my previous letter. Its certainly I am not going to worry anything about, since you put the money into it, go to it and make something out of it. I imagine the proposition must be all right. I would be only too glad to come down there if I was footloose here, but you know my position here as well as me. I don't see how you thought I could come down there. It's certainly had no intention of it last fall, or else would go down there then. As you know I looked at the thing to be of mutual advantage to both of us, but I did not calculate on putting more money than what you had; in short Jack got what he asked for in doing that and the extra money you got. I had no intention of going any further, as I took it for granted in getting that amount Jack could carry along, but that don't hurt the proposition any, if its good, its good. I can believe you as well or better than anyone else I talked with regarding it. Remember Ed in all your

letters you have said nothing about the prospects in that particular piece of ground, only that you believed there was 150,000\$ in it. However its immaterial if there was a million in it, and I hope there is, I have done to much preparations here to leave being you have that much money invested already you should have no trouble in getting someone interested to carry the thing through. Go at it and make something out of it and don't worry about my part. I am sure you havent lost anything that shows around here so far, you have it all to win. Everybody around here things you have done a good thing and that you will make a stake out of it. Gus and Patten is leaving for the Hosiana, Patten having a letter from McGaff advising him to come there. Dick Morris and Co. sold their lay to Howell, \$1,000, on bedrock, and went cutting wood. Bob is going to work on Midnight-Sun—Nothing else new of any importance. With best wishes for success,

Yours,

DICK.

[Indorsed]: # 1815. Pltffs. Ex. "G." Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [49]

EDWARD WILLIAMS resumes his testimony of direct examination.

Mr. CLARK.—Q. Mr. Williams, at the end of 90 days, the time when that note fell due—the note that has been introduced in evidence—did you see Mr. Hurley or have any conversation with him about the note? A. Yes, sir.

(Testimony of Edward Williams.)

Q. What, if anything, was said between you and Mr. Hurley at that time?

A. I told him that I had a letter from Mr. Richards, and that he wouldn't do any more at present.

Q. Then what, if anything, was done? Was there anything done about that mortgage?

A. The mortgage was given until February, I think. That was sometime after the note was due, Mr. Clark.

Q. Did you have any conversation between the time the note fell due and February when the other note was given?

A. Not of any importance that I can recollect.

Q. Then tell what happened in February at the time the mortgage was given.

A. Well, having received Richards' letter asking me for to take someone else into the proposition with me, I started to look around for somebody, and I got a couple of boys there—McKenzie and McLellan to go in with me. And I had to give a mortgage as security, you see, for the renewal of this note.

Q. What happened at the time the note was renewed?

A. Well, that is the time that I sold—*how* got McKenzie and McLellan in with me, you see—that is the time I signed the [50] mortgage.

Q. What did you do in regard to the original note—I mean concerning the interest?

A. I got some cash from the boys I had sold to. I paid the interest up to that time on the note.

Q. This note dated October 6th is stamped "Paid

(Testimony of Edward Williams.)

February 25." Did you pay that note at that time? Did you pay the \$3500.00 that was due on that note I mean, in cash? A. No, sir.

Q. What did you do? A. I gave a mortgage.

Q. Did you execute a new note? A. Yes, sir.

Q. I show you this instrument and ask you to examine it. (Hands paper to witness.) A. Yes, sir.

Q. Is that the note that was given at that time?

A. Yes, sir.

Mr. CLARK.—We offer it in evidence.

Mr. PRATT.—We object to it. It is the note in suit, of date February 24, 1911, for \$3500. It is to the American Bank of Alaska. The plaintiff can't take one stand on a certain theory in his pleadings, and then abandon it. This complaint says those men were mining copartners and that is the reason Williams had authority to sign that note notwithstanding Richards was eleven hundred miles away and knew nothing about it. Another phase is that this note is signed in the individual names of these two people: "Edward Williams, Edwin, Richards by Edward Williams, his attorney in fact." One mining copartner or any other kind of a partner has no authority to sign a promissory note in the name of the individuals composing that copartnership; especially here where he asserts that right under a power of attorney, and this witness had already testified that he didn't have any [51] power of attorney. Neither those signatures, or the individual signature by Williams as attorney in fact, have any force whatever. This man has shown by his testi-

(Testimony of Edward Williams.)

mony that these men were not mining copartners, and he has shown that he didn't have a power of attorney.

The COURT.—He said he had no power of attorney, but the question of the relationship between them is a question to be decided in the case.

Mr. PRATT.—Until a *prima facie* case is made, where the execution of a note is denied under oath, as it is here,—until the plaintiff proves *prima facie* that that is an act of the defendant, he cannot introduce it in evidence.

The COURT.—I think a *prima facie* case has been made, Mr. Pratt.

Mr. PRATT.—We formally object to the introduction of that note in evidence—the note that is in suit and that is copied in the complaint,—for the reason that it is incompetent, immaterial; for the further reason that there has not been a *prima facie* showing here so far that that is the note of the defendant Richards; that he ever was a mining partner with this man Williams; and it has been positively shown by this man's testimony that he didn't hold any power of attorney and was not authorized for that reason.

(Objection overruled. Defendant excepts. Exception allowed.)

(Note marked Plaintiff's Exhibit "H" and read to jury.) [52]

Plaintiff's Exhibit "H" [Promissory Note, Dated February 24, 1911, Edward Williams et al. to American Bank of Alaska].

(NOTE)

No. (379), Due July 1 /11.

Iditarod, Alaska, Feb. 24, 1911. \$3500.00.

On or before July 1/1911 after date, I promise to pay to the order of American Bank of Alaska, at its office in Iditarod, Alaska, Thirty Five hundred & no/100 dollars, for value received, with interest after date at the rate of twelve per cent per annum until paid, Principal and interest payable only in U. S. Gold Coin of the present standard of weight and fineness. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety, and promises, in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the court may adjudge reasonable as attorney's fees in such suit.

EDWARD WILLIAMS,

EDWIN RICHARDS,

By EDWARD WILLIAMS.

His Attorney in Fact.

By EDWARD WILLIAMS.

RICHARDS & WILLIAMS,

[Indorsed]: # 1815. Pltffs. Ex. "H." Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [53]

(Testimony of Edward Williams.)

Mr. CLARK.—Q. Did you execute a mortgage at the time that note was given? A. Yes, sir.

Q. Did you receive any other or further money at the time that note was given, other than the money that had been received and evidenced by the first note?

A. At the time the note was given, did I receive any money?

Q. Yes. A. No, sir.

Q. After that second note was given—the one in suit—did you continue mining operations?

A. We commenced, yes, sir.

Q. Was the venture a success or a failure?

A. A failure.

Q. When did you leave there?

A. In September. I don't know just the day of the year.

Q. What year?

A. I don't know the exact date, or the year. It was in September.

Q. What was covered by the mortgage, Mr. Williams—was it the lay?

A. Yes, Mr. Hurley took a mortgage on the lay.

Q. What became of the lay afterwards?

A. It reverted back to the owners.

Q. Why?

A. Because we couldn't make a success of it.

Mr. CLARK.—Why did it revert to the owners?

A. Because it failed to be a success.

Q. Did you at any time before you left the Iditarod have any communication from Mr. Richards concerning any other business deal than this particular

(Testimony of Edward Williams.)

one? A. Yes, sir.

Q. About what time, do you remember?

A. The early part of September, I don't know the date exactly.

Q. Through what medium was this communication received? [54]

A. By the wireless.

Q. Examine that instrument (hands to witness a paper) and say if you have seen that before.

A. Yes.

Q. Did you receive that on or about the date set forth in the telegram?

A. About that date. I guess on that date.

Mr. CLARK.—We offer this in evidence.

The COURT.—It may be admitted.

(Marked as Plaintiff's Exhibit "I" and read to jury, which exhibit is in words and figures following, to wit:) [55]

[Plaintiff's Exhibit "I"—Telegram, Dated September 12, 1911, Edwin Richards to Edward J. Williams.]

(TELEGRAM.)

(ALASKA WIRELESS TELEGRAPH
COMPANY.)

RECEIVED AT

21 di mc 19.

Fairbanks, Alas Sep. 12, 1911

Edw J. Williams,

Care Ind. Fone. Co. Iditarod.

Buy Curran quietly eight below Dome Creek five

(Testimony of Edward Williams.)

hundred cash money American Bank if possible sell and come answer.

EDWIN RICHARDS.

443 p

Envelope: Printing left-hand corner:

Iditarod Telephone Co

Iditarod, Alaska.

Addressed: Edw. J. Williams

Flat.

No. 11 c/o Idit Telephone Co.

[Indorsed]: #1815. Pltff. Ex. "I" Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [56]

Mr. CLARK.—Q. From the telegram I have just read, did you understand what Mr. Richards required you to do?

A. Yes, sir.

Q. Did you comply with his request contained in that telegram? A. In purchasing it?

Q. Yes. A. Yes, sir.

Q. Where did you get the money?

A. I didn't have any money. I had Mr. Curran make out a deed and had it deposited in the Miners & Merchants' Bank, and I wired to Mr. Richards to send the money and the deed would be withdrawn and forwarded to him.

Q. That is all that you had to do with that transaction? A. That is all to my knowledge.

Q. How long after that did you start back to this country from the Iditarod?

A. Oh, maybe a week.

(Testimony of Edward Williams.)

Q. Where was Mr. Richards when you got back?

A. He was on his way outside when I got to Hot Springs.

Q. When did you first see Mr. Richards after that?

A. The following spring. I don't know the exact date.

Mr. CLARK.—Your witness.

Cross-examination.

(By Mr. PRATT.)

Q. Mr. Williams, you say you had known Richards in the fall of 1910. Had you known him ten or twelve years?

A. Well, not previous to that. Up to the present time, it would be about that.

Q. At this time you have known him about ten or twelve years?

A. Ten or twelve years. Yes.

Q. And Mr. Boulton about the same length of time? A. No, not until some years after. [57]

Q. You worked for Dick Richards here, as they call him, over on Dome, did you? A. Yes, sir.

Q. He was a mining operator there?

A. Yes, sir.

Q. In what capacity did you work there?

A. Cooking. That is, when he *stated* up there I worked out doors and cooked for the three of us.

Q. How long did you work for him on Dome Creek? A. About thirteen months.

Q. Was Boulton over there during that time?

A. He was working in Dome City at the time.

Q. Did you get acquainted with him there?

(Testimony of Edward Williams.)

A. No.

Q. Had you known him before that?

A. Yes, sir.

Q. Where? A. In Dawson.

Q. Had you ever been in partnership with him?

A. Yes, sir.

Q. You were quite well acquainted with him when you saw him over on Dome Creek in 1908, was it, or 1906?

A. I don't know just the year, I am sure.

Q. 1906 or 7? A. About that time.

Q. Or 1908, along in there? A. Yes, sir.

Q. In 1908 Mr. Richards pulled up and got through over here on Dome Creek and took his machinery and everything and went down to the Hot Springs to mine? A. Yes, sir.

Q. You went with him?

A. I went the same year. I didn't go with Mr. Richards.

Q. You followed down there pretty soon after?

A. I went down.

Q. Did you go down to work for him?

A. I didn't know that—(interrupted).

Q. Did you go to work for him after you got there?

A. I worked for other parties first. I helped him build a cabin. [58]

Q. How long did you work for him in the Hot Springs country for wages?

A. From about the 1st of March until about the 15th or 16th of September.

Q. What year? A. 1909, I think.

(Testimony of Edward Williams.)

Q. Yourself and Johanson took over a lease from him on some ground of his in which he was part owner—owned an interest in—didn't you, in 1909?

Mr. CLARK.—We object as immaterial, not cross-examination.

Mr. PRATT.—He spoke of it himself and I want to show the relationship between him and Richards.

The COURT.—Overruled, then.

Mr. PRATT.—Go ahead. Didn't you and Johanson take over a lease from Richards on some mining ground on Cache Creek in the Hot Springs district?

A. Yes, sir.

Q. What year was that? A. 1909.

Q. And you mined there until sometime in the spring of 1910?

A. Yes, that winter and the summer—the previous summer.

Q. That proved to be a sort of a disastrous affair for you, didn't it? A. Yes, sir.

Q. Mr. Richards advanced you ten or fifteen hundred dollars or more?

Mr. CLARK.—Objected to as immaterial. He said when he went down there he was indebted to Richards in some considerable sum of money. (Objection overruled.)

A. About the money advanced?

Mr. PRATT.—Yes. How much money did he advance in all?

A. He didn't advance it to me alone, but to the other partner, too.

Q. How much? [59]

A. Nine hundred and some odd dollars in cash at

(Testimony of Edward Williams.)

Mr. Morrison's, that Mr. Morrison had borrowed from Richards. I don't know that Mr. Richards left that for me there at the time.

Q. You got the nine hundred dollars credit and over at Morrison & Saul's, you and your partner?

A. Yes, sir.

Q. Through Richards? A. Yes, sir.

Q. And something besides that, too.

A. There was some meat and wood and things that Richards—

Q. You say about four or five hundred dollars?

A. I don't know exactly the amount.

Q. When you quit mining there in the spring of 1910 you owed Mr. Richards six or seven hundred dollars, didn't you? A. Yes, sir.

Q. Ain't this true: That during the summer of 1910 you concluded that that lay on Cache Creek in the Hot Springs District wasn't going to turn out very good? A. I proved it.

Q. You thought so during that period of time?

A. It was a fact.

Q. Now, isn't it true that you opened negotiations sometime during the early part of 1910, and during the spring and summer, with a man by the name of Jack Boulton on Flat Creek, this same Jack Boulton that you knew on Dome Creek?

A. I opened no negotiations with Boulton. I received a letter from Boulton, and I also answered it.

Q. You received a letter from him? A. Yes.

Q. What was the purport of that letter?

A. It was explaining the conditions down there and the chances that he had there.

(Testimony of Edward Williams.)

Q. He told you about a lay that he had on Flat Creek? A. Yes, sir.

Q. Did he tell you who his partners were? [60]

A. I can't recollect.

Q. What? A. Not his partners at that time.

Q. You found out afterwards his partners' names were Kennedy and Shively?

A. When I went down there they were. Yes.

Q. Where is that letter that you got from Boulton? A. I don't know.

Q. Have you got it yet? A. No, sir.

Q. Did you ever show that to Richards?

A. The letter that—(interrupted).

Q. That Boulton sent up to you?

A. The one he sent in the spring?

Q. Yes—whenever he sent it.

A. I think I discussed the letter with Richards. I don't say that I showed it to him.

Q. About what time did you get that letter in the spring of 1910 from Boulton?

A. Navigation was opened up because I got that letter the time Mr. Richards' friend was on his way down to the Iditarod?

Q. Richards' friend?

A. Yes. Thomas Williams.

Q. Had you been talking to Richards about Boulton and his lay before you got that letter?

A. I wouldn't be positive.

Q. Hadn't he sent you word by somebody that had come up from there? A. Mr. Boulton?

Q. Yes.

A. No. I don't think he made it a point to send

(Testimony of Edward Williams.)

me any word. I think I made inquiries.

Q. Didn't he, either by sending you word, or in this letter, [61] want you to come down there and buy in with him; that he was having difficulties with his partners? A. I can't recollect.

Q. Didn't he make some overtures to you of that kind—of that description?

A. No. I couldn't say that he did.

Q. Do you want to say that he didn't?

A. In reference to having any trouble with his partners—

Q. Didn't—(interrupted).

Mr. McGOWAN.—Let him finish his answer.

The COURT.—Had you finished your answer?

A. No. When I received this letter the partners that were his partners, when I went down there were not his partners at that time. He had a partner previous to those.

Mr. PRATT.—Q. I don't care so much about that. But didn't that letter invite you to come down there and put in with him—buy an interest in that lay with him? A. Well, I can't recollect.

Q. Didn't he propose to sell you a quarter interest in this lease for \$2,000.00, in his letter?

A. No, sir.

Q. Did he say anything about any amount that he wanted, in the letter?

A. Not in the letter that I received in the spring.

Q. Did he send you any other letter than that?

A. The letter that he wrote that the telegram refers to, I received in the Iditarod after I got down there.

(Testimony of Edward Williams.)

Q. Did you receive any other letter than the ones you have admitted receiving, from Boulton?

A. Not to my knowledge.

Q. What if anything was in that letter about you coming down [62] there and buying in with him in a lease? Can you give the jury any idea what it was?

Mr. CLARK.—He has not testified there was anything.

A. No, sir, I can't.

Mr. PRATT.—Q. Isn't it true that there was something in that letter about you coming down there and becoming interested and buying in with him in the lease? A. I can't admit it.

Q. Wasn't there? A. I can't admit it.

Q. If you can't admit it, how does it come that you talked right after that with Richards about going down there and buying in with Boulton?

Mr. CLARK.—We object, as not the testimony.

A. In the spring?

Mr. PRATT.—Q. Yes If there was nothing in Boulton's letter about that, how did it come that you were talking to Richards on that subject?

A. About buying?

Q. Yes, about going down there, and about Boulton having a lay there, and it was a good thing, and that he wanted to sell an interest in it. You have told the jury you were talking with Richards about that. If you were, how could you do it, unless Boulton had written to you something of that kind?

A. We may have discussed the proposition. But I won't admit that he wanted me to come down and

(Testimony of Edward Williams.)

buy in with him.

Q. What will you admit that he said about his lay and about wanting to sell it?

A. I can't admit anything of him trying to sell it to me.

Q. What was said on that subject? [63]

A. He may have and he may not. I can't recollect.

Q. Did he ask you to come down there, in that letter? A. I can't recollect.

Q. Did he invite you to interest yourself with him in any way, in that letter?

A. I can't recollect the contents of the letter.

Q. What? A. I can't recollect.

Q. You *discuss* this letter with Richards, though, didn't you? A. We talked the matter over.

Q. The talk with Richards had reference to Boulton's lay on Flat Creek, and that he wanted to sell an interest in it, didn't it? A. I can't admit it.

Q. You can't remember it? A. I can't admit it.

Q. Do you want to deny it?

A. I am very uncertain on that point.

Q. Did you know from that letter who Boulton's partners were at that time? A. No, sir.

Q. Did you know from that letter whether he was having any difficulty with his partners?

A. No, sir.

Q. Did anybody that he sent to you that was coming from Iditarod to Hot Springs—did they tell you anything about Boulton's lay and who his partners

(Testimony of Edward Williams.)

were and that he was having any difficulty with them?

A. He never sent anyone to me. The only information I found was by inquiry.

Q. Did you by your inquiry find any such a state of facts as that, apparently?

A. Just found out that he had a good proposition down there. [64]

Q. Did you also find out that he wanted to sell an interest in it? A. Not from that party.

Q. Did you find out from anybody that you talked to there in Hot Springs that Boulton was having some disagreements with his partners?

A. I may have. I don't remember discussing that with him, though.

Q. Not with him, but with anybody down there.

A. I don't remember discussing him having any trouble with his partners with anybody. I didn't know his partners.

Q. You don't know now who his partners were when you got that letter from him, or about that time?

A. That is the letter in the spring. The letter was written in March and I got it in June.

Q. You *don't* know who his partners were when you got that letter in June. A. I can't recollect.

Q. When you wrote to him, did you tell him—speak anything about Dick Richards, that he had money? A. When I wrote to Mr. Boulton?

Q. Yes, to Boulton. A. I may have.

Q. Boulton knew Richards on Dome Creek and

(Testimony of Edward Williams.)

down in the Hot Springs too, didn't he? He knew he was a man of means, didn't he?

A. Oh, yes, supposed to know.

Q. Now, speaking of the telegram that is marked Plaintiff's Exhibit "A," third trial (reads): "Kaltag, Alaska, September 12th 1910. Dick Richards, Hot Springs, Alaska, Send two thousand at once, through N. C. fifty thousand at stake twelve [65] dollars foot. Freeze out game don't fail see letter answer. John Boulton." When was that telegram received there—do you know?

A. I don't know the exact date.

Q. About that time, wasn't it?

A. The date—(interrupted).

Q. It came over the telephone first from Hot Springs, did it not? A. Yes.

Q. Isn't it a fact that it came to Mr. Richards over the telephone up there on Cache Creek, and that he took it down, and came down to his own place where you were— A. Yes.

Q. And he came in, and you were in bed, and he showed it to you?

A. Yes, sir, read it to me or showed it to me.

Q. Didn't he say this to you: Told you that there must be some mistake about this; that that telegram must have been intended for you?

A. I believe he made such a remark.

Q. What?

A. I think he made a remark to that effect, that is, he thought so. He discovered that it was not sent to me though. He took it on the phone, as to Richards

(Testimony of Edward Williams.)

& Williams when he first took it, that is, the telegram he received over the phone, but the original doesn't show that.

Q. He and you had some discussion about that that night. A. We talked the matter over.

Q. You understood from this that John Boulton down there at Flat Creek—he was then at Kaltag, however—wired you—

Mr. McGOWAN.—That is the transmitting station.

Mr. PRATT.—Q. He was over there at Flat Creek or Iditarod City or Twilight City—

Mr. McGOWAN.—There was no wireless there at that time on Flat [66] Creek.

Mr. PRATT.—Q. You knew he wanted \$2,000.00 right away to protect himself against a freeze-out game there, didn't you?

A. That is what the telegram says. That is all I had to go by.

Q. He said he had ground there that would go \$12.00 to the foot. A. That is what he did.

Q. It speaks of a letter there. Didn't that letter afterwards come up, addressed to you?

A. It must have come to me, because I got it in the Iditarod.

Q. That is the same letter that is referred to in this telegram?

A. It must be. It is the only letter.

Q. What, if anything, did you say about that? Was there anything definite talked between you that night? A. Richards and I?

(Testimony of Edward Williams.)

Q. Yes. A. In regard to the telegram?

Q. Yes.

A. I can't say what the talk was. I know we discussed the letter. That is all.

Q. You told the jury something about going to Tofty to see somebody and talk to somebody over there. A. Yes, but not that evening.

Q. That was the next day, was it? A. Yes.

Q. Mr. Richards went with you?

A. We went to Tofty together.

Q. Didn't he advise you to look into the thing and see whether it was a good thing?

A. We were looking for information.

Q. Didn't you say that you would? Didn't he ask you if you would like to go down there and buy in there with Boulton? [67]

A. He asked me if I wouldn't like to go down.

Q. Yes. Didn't he ask you something like that?

A. Yes. Something to that effect.

Q. Didn't you say, "What is the use of me talking? I have not got any money."

A. Those are the words.

Q. Didn't he then say he would stake you to the money, if you wanted to go, but to investigate the thing before you started; to look into the lay?

A. I can't recollect his words.

Q. That was the meaning of it?

A. He gave me the money.

Q. He said he would stake you to the money, if you wanted to go down and buy in there with Boulton?

(Testimony of Edward Williams.)

A. I don't remember his remarks when he gave me the money.

Q. This is about the substance of what he told you before he gave you the money; that if you wanted to go and put in there with Boulton, he would stake you to the money?

A. He didn't say about staking me to the money I couldn't admit that.

Q. What words did he use before giving you the money? A. Before giving me the money?

Q. He wanted you, before you started at all, before he let you have the money, he wanted you to make some investigations there, didn't he?

A. I told him about this Merrifield, and he said we would go down and I could find out what I could from him.

Q. How far did you have to go?

A. About a mile and a quarter.

Q. Was that the next day that you saw this Merrifield? A. The next evening. [68]

Q. You talked to Merrifield, did you?

A. Yes. I called on him.

Q. Richards didn't talk to him at all, did he?

A. No.

Q. Did you talk to anybody else about the Flat Creek country and Boulton and his lay at Tofty?

A. No, not at Tofty.

Q. What time did you and Richards start back to his place on Cache Creek from Tofty?

A. I couldn't say the exact time. In the evening

Q. What time did you get back home?

(Testimony of Edward Williams.)

A. I don't remember.

Q. You went to bed and slept that night?

A. I suppose so.

Q. Where did you go the next day, do you remember?

A. I think Mr. Richards went to Hot Springs.

Q. You think he went to Hot Springs. After you got back from Tofty, did he hand you any money or give you any check?

A. He gave me the check for \$2,300.00, and \$200.00 in currency.

Q. That was the next day after you got back from Tofty after you talked with Merrifield—isn't that true?

A. Yes, Mr. Richards and I went to Tofty.

Q. You say the next day after you made that trip to Tofty, he gave you this \$200.00 in currency and the \$2,300.00 check?

A. I wouldn't be positive about the day or two after. The only thing is, I know he gave me the money.

Q. One or two days after. He did that upon your representation that you had written to Boulton, you had talked to the man that came up from there that knew about Boulton's lay, and you wanted to go down there and thought when you got [69] down there, if you could buy in with him you could make some money. Were not those the reasons that Mr. Richards gave you for handing you the money?

A. I didn't quite understand you, the way you put that question.

(Testimony of Edward Williams.)

Q. I say, hadn't you told Mr. Richards about what Boulton had written you, about the information you had got from people in talking to them; that you thought Boulton had a good piece of property down there; that he wanted to sell you an interest, and you wanted to go down and buy in there? Was not that the conversation, and that the reason that led Mr. Richards here to hand you that \$200.00 in money and the \$2,300.00 check?

A. I don't know as I was enlightening Mr. Richards about that proposition. The information I received from Boulton I received in June, and this transaction was taking place in September. Mr. Richards was as much enlightened about that transaction as I was. He also asked his friend. He phoned to his friend to Hot Springs to look the matter up—to Mr. Thomas Williams.

Q. What is that?

A. Mr. Thomas Williams in June, to look the matter over. And this transaction is taking place in September. The only information I received after that was from Merrifield after we received this telegram. I didn't look up any information at all until after we received that telegram.

Q. Have you got that letter of June from Boulton? You say you told Richards about that, didn't you?

A. Yes.

Q. And he did that on your behalf? He had a phone there in his place? A. Yes.

Q. He could phone down to Hot Springs, couldn't he, without expense? A. Yes. [70]

Q. And he phoned down there and got some in-

(Testimony of Edward Williams.)

formation for you from Williams, didn't he?

A. Information for me?

Q. Yes. A. For me from Williams?

Q. Yes. Who was that man?

Mr. McGOWAN.—Let him answer.

Mr. PRATT.—Q. Who did he phone to at Hot Springs? A. Tom Williams.

Q. He just phoned down there to get some information for you. A. No, sir.

Q. When Williams answered him, didn't he tell you what Williams said?

A. We were telling Mr. Williams the information I had received in this letter, and Mr. Richards wanted him to look the matter over.

Q. Did you ask Richards to phone Williams down there and see what he would say about it, after you got this letter from Boulton?

A. I can't recollect.

Q. You do know that Richards, when he got the information from Tom Williams, told you what it was, didn't he? He told you what Tom Williams said?

A. Mr. Richards I don't think ever got any information from Tom Williams.

Q. He didn't get any from him at all? Is that the way you want to leave it?

A. Mr. Richards was trying to enlighten Tom Williams about the proposition after I told Mr. Richards about it.

Q. Oh. And Tom Williams was going to Iditarod too? A. Yes, sir.

(Testimony of Edward Williams.)

Q. But before Mr. Richards could phone down there and [71] catch Tom Williams, he had left Hot Springs and gone on down to Iditarod.

A. I am not so sure whether he had gone or not.

Q. You don't want to be positive whether Mr. Richards gave you that check up there on Cache Creek—the \$2,300.00 check?

A. You say I am positive?

Q. Do you want to be positive that he gave you that check on Cache Creek? A. Yes, sir.

Q. Don't you know he gave you that check down at the N. C. store in Hot Springs? A. No, sir.

Q. What day did you leave the Hot Springs?

A. I can't recollect the date.

Q. Don't you know it was the 16th?

A. That I left Hot Springs?

Q. Yes. A. That may have been, too.

Q. If the check is dated on the 16th, he must have given it to you down at Hot Springs.

A. The reason that check is dated on the 16th is because Mr. Richards didn't wish me to present that check until he had made some arrangements about some money.

Q. When you got down to Hot Springs, you found Richards there. He had gone ahead of you, had he?

A. Yes, sir.

Q. You say you had some conversation there with him? A. Oh, yes.

Q. About the trip?

A. Yes. We talked the matter over.

Q. You say he told you in the N. C. Company's

(Testimony of Edward Williams.)

store that if things looked very good down there that he might go stronger than he had gone with the \$2,500. A. Yes. He made that remark. [72]

Q. Who was present and heard that?

A. There were several parties present in the store. I don't know who.

Q. Didn't you testify at the second trial that it was Howard Curtis of the N. C. Company?

A. He was in the store. Howard Curtis was in the store.

Q. Didn't you testify at the second trial that Howard Curtis was present and could have heard that if he wanted?

Mr. CLARK.—We object to that as not the proper form of an impeaching question.

The COURT.—Sustained. Ask him in the usual way.

Mr. PRATT.—Q. Was Howard Curtis there present when Richards made that expression?

A. He was in the store.

Q. How close was he to him?

A. That I cannot say.

Q. Was he close enough to have heard it, if he said it?

A. He might have heard it if he had been listening. There were several other persons in the store.

Q. You are satisfied now that he was quite close to him when that conversation took place?

A. I could not state he was close enough to hear it.

, Q. You didn't testify to that at the first trial?

(Testimony of Edward Williams.)

(Objected to as not proper form of impeaching question.)

(Sustained. Defendant excepts.)

Q. Isn't it true that at the first trial you made no mention of a conversation between you and Richards in the N. C. Company's store at Hot Springs, in which Richards said, as you now testify, that if things looked good to you down there he would go stronger?

A. I didn't make that statement in the first trial.
[73]

Q. You didn't? A. No, sir.

Q. When did you first make that statement in these trials? A. At the second trial.

Q. When did you first tell your attorneys that he had made that expression?

(Plaintiff objects as immaterial, nothing to show that he has attorneys. Sustained. Deft. Richards excepts.)

Q. When did you tell McGowan & Clark first about that, that he had said he might go stronger?

A. I can't recollect of ever telling them. I told it in the court at the second trial. I may have told them. I won't admit it. But I told it there.

Q. You certainly did not tell them before the first trial, did you? A. No.

Q. Can you give any reason why you did not testify to that at the first trial?

(Plaintiff objects as improper; nothing to show he was asked concerning it. Sustained. Deft. Richards excepts.)

(Testimony of Edward Williams.)

Q. Mr. Williams, did you have any conversation with Mr. Richards before you left? You left on a boat? A. Yes.

Q. On the evening of the 16th, didn't you?

A. In the morning about 4 o'clock.

Q. And went down to the Iditarod. A. Yes, sir.

Q. Did you have any conversation with Richards at any time after getting this telegram from Boulton, between that and the time you left, that you would go down there and buy a quarter interest or any interest with Boulton and take the assignment of the lease in the name of yourself and Mr. Richards?

A. No, sir.

Q. Did you have any conversation with him, or did you have any verbal contract, or any written contract, that you would go down there and buy into that lease on Flat Creek, and that [74] he and you would mine there as mining copartners during the summer of 1911? A. No, sir.

Q. Was there anything said between you—now, I am talking about down here at Hot Springs and before you left—about any partnership name?

A. No. There was not.

Q. Was there anything said about you going down there and putting that money he had given you in a bank in the name of the partnership of Richards & Williams? A. No, sir.

Q. Was anything said between you about dividing profits and losses of any business down there?

A. No, sir.

Q. Was there anything said between you about

(Testimony of Edward Williams.)

your buying anything at all with that \$2,500.00 other than a quarter interest in the Boulton lease?

A. I can't say we discussed about buying. I was just given the money and sent down there to use my own judgment.

Q. Was there anything said about buying anything else? Was not everything of your talk about buying a quarter interest in the Boulton lease?

A. I don't know much about a quarter. I don't know where that quarter comes in. Mr. Boulton doesn't say anything about a quarter. Didn't know whether it was going to buy a quarter, a half, or the whole. That telegram doesn't say anything about a quarter.

Q. Didn't the letter say something about him giving a half interest, and he wanted to sell half of the half, which would be a quarter?

Mr. CLARK.—We object to that, as there are two letters.

Mr. PRATT.—The letter you got in June, didn't that tell you [75] he had a half interest and wanted to sell half of that half, which would be a quarter?

A. I don't think I acknowledged that. I can't remember.

Q. You can't recollect. A. No, sir.

Q. You remember pretty distinctly the time that you left Hot Springs, didn't you? A. Yes, sir.

Q. Dick Richards was there with you?

A. Not when I left.

Q. You saw him shortly before you left?

A. The night before, before we retired. I left at

(Testimony of Edward Williams.)

4 in the morning.

Q. Did you make this expression to him the last time you saw him there at Hot Springs before you started down the river: "I appreciate your kindness in giving me the money to go, and I will do the right thing in return?"

A. I may have expressed myself that way.

Q. When you got down to Iditarod City, it was called Twilight City, wasn't it then? A. Yes, sir.

Q. When you got down there you had a letter of credit from him on the N. C. Company.

A. Yes, sir.

Q. And you drew the cash, \$2,300.00.

A. Yes, sir.

Q. And you deposited that in the name of Edward Williams, that is, in your name, in the Miners & Merchants' Bank at Iditarod City. A. Yes, sir.

Q. Was Mr. Boulton there to meet you?

A. He was in Twilight when I got there.

Q. Who did you learn his partners were at that time?

A. I didn't learn until I went out to the creek.

Q. Who did you find his partners to be?

A. Shively and Kennedy. [76]

Q. What did you find the relationship between those three men, friendly or otherwise?

A. Well, that I couldn't say. They may not have been getting along very well.

Q. Boulton wanted you to buy an interest of him—a part of his interest—didn't he? A. Yes.

Q. How much did he want to sell to you?

(Testimony of Edward Williams.)

A. A quarter. He sold me a quarter.

Q. He owned a half, didn't he? A. Yes, sir.

Q. Kennedy and Shively owned the other half.

A. Yes, sir.

Q. He wanted you to buy their half too, didn't he?

A. Well, I used my own judgment. I didn't go according to what Jack Boulton told me.

Q. Didn't he ask you and request you to buy those other men out?

A. He considered it a good proposition, and I was looking it over, and I decided to buy it.

Q. Didn't he want you to buy them out so he and you could have charge there and you could get along together and make a go of it?

A. I don't know much about that.

Q. Wasn't that the drift of his talk?

A. No, I couldn't say.

Q. Anyhow, after you got there you concluded to buy Shively and Kennedy's half interest, as well as this quarter interest of Boulton?

A. I bought the half first.

Q. How much did you give Boulton for his quarter interest? A. \$2,000.00. [77]

Q. How much were you to give these other men?

A. \$4,500.00.

Q. You say in one of these letters that when you got to Twilight City you found Jack waiting for you. That is Jack Boulton. Had you notified him that you were coming?

A. No. I can't recollect whether we wired him or wrote him. I think we wired him.

(Testimony of Edward Williams.)

Q. Who wired him?

A. I wired him, I think.

Q. Where from?

A. From Cache Creek.

Q. What did you tell him?

A. I told him I was coming.

Q. Can you tell the contents of that telegram any more than that? A. No, I can't.

Q. Did you tell him you were fetching money with you—two thousand dollars in money?

A. I don't know whether I mentioned two thousand in the telegram or not.

Q. Did you say anything about money?

A. I might have wired him; told him to hold it. Am coming. Something to that effect.

Q. To hold it; that you were coming.

A. Yes, sir.

Q. You met Boulton there, and you went out on Flat Creek. A. Yes, sir.

Q. That is eight or ten miles from Iditarod City?

A. Yes, sir.

Q. How long were you gone?

A. A day or two.

Q. While you were over there you purchased Kennedy and Shively's half interest. A. No. [78]

Q. Or bargained for it?

A. I looked the matter over.

Q. You agreed upon a price with them.

A. They told me the price. I hadn't agreed at the time.

Q. What?

(Testimony of Edward Williams.)

A. I hadn't agreed to make the purchase at all when I was out there.

Q. You hadn't?

A. No, I just looked the matter over.

Q. Had they made a price to you?

A. I think they had.

Q. You, of course, told them that you didn't have the money, and, unless you could borrow it, you couldn't buy. I suppose that is the way it happened, is it not? A. Yes.

Q. In a day or two, you and Boulton and Kennedy and Shively came over to Iditarod City to see if you could get that money, didn't you?

A. I don't think they came in with me for that purpose.

Q. They came in with you, anyway.

A. They came into town.

Q. With you and Boulton.

A. No. They didn't come in the same time.

Q. The same day?

A. It may have been the same day, but we didn't come in together.

Q. Your \$2,300.00 was on deposit in the Miners & Merchants' Bank then. A. Yes, sir.

Q. What did you do when you came to town with reference to raising the money to buy this half interest of Kennedy [79] and Shively?

A. Well, I first took my money—I presented my letter of credit at the N. C. and got my money and took it to the Miners & Merchants' Bank. I was

(Testimony of Edward Williams.)

talking the matter over there with Mr. Linderbloom—

Q. How did you deposit it there?

A. In my name.

Q. In your own name. A. Yes, sir.

A. I talked the matter over with him, and he told me that he would advance me dollar for dollar. If I deposited \$2,000.00 he would give me \$4,000.00; if I deposited \$5,000.00 he would give me \$10,000.

Q. You tried to make a loan there then.

A. He told me he would have to consider the matter first.

Q. You didn't name Richards in it at that time at that bank? A. No, sir.

Q. You didn't mention his name at all.

A. Not at that time.

Q. At that bank.

A. I may have told him that Mr. Richards was my partner.

Q. Are you sure you did?

A. I would not be certain.

Q. Anyhow, the loan that you were going to get from the Miners & Merchants' Bank were going to get on your own responsibility from that bank, were you not? A. I don't know.

Q. What? A. I don't know.

Q. Don't you remember now that that was what you were talking about; that you were talking with that bank on the theory that you were going to borrow the money yourself from them [80] if you could? A. I couldn't say as to that.

(Testimony of Edward Williams.)

Q. You were not going to borrow it on the strength of Richards & Williams, were you?

A. I don't know.

Q. Did you say anything about borrowing—(interrupted).

A. No, not at the time. I just told him Mr. Richards was my partner.

Q. You now feel sure that you told him Mr. Richards was your partner at the Miners & Merchants' Bank. A. No. I am not so certain of that.

Q. What? A. I can't recollect.

Q. But you do recollect that you didn't propose to borrow the money from the Miners & Merchants' Bank in the name of Richards & Williams. You do know that, don't you?

(Objected to. Question withdrawn.)

Q. You didn't offer to do anything like that, did you?

A. No, I hadn't transacted any business. It hadn't come down to a business point. We just talked the matter over.

Q. You talked the matter over with the Miners & Merchants' Bank until you concluded you couldn't get any loan there, then you quit them and went to the American Bank of Alaska.

A. It didn't come to the question where I couldn't get a loan.

Q. You didn't get a loan there, did you?

A. No, sir.

Q. You tried to get a loan there?

A. I spoke to Mr. Linderbloom about it.

(Testimony of Edward Williams.)

Q. You were trying to get that loan by your own name, were you not? A. I cannot admit it.

Q. You will not deny it, will you?

A. I can't admit it. [81]

Q. But you do know that you didn't offer to that bank that you would give a paper signed Richards & Williams, if they had let you have the money. You know you didn't do that?

A. I didn't do it, no. We didn't discuss that.

Q. You didn't offer to do that.

A. We didn't discuss that.

Q. You didn't discuss it with the Miners & Merchants' Bank from that standpoint, did you?

A. No. I didn't.

Q. When you failed there, what did you do?

(Objected to. Question withdrawn.)

Q. When you failed to get the loan, what did you do?

(Objected to. Sustained.)

Q. When you got through there at the Miners & Merchants' Bank and didn't make the loan and didn't get the money there, what did you do?

A. I went into Morgan's one day and I was talking the matter over with him and told him how I was situated, and I told him, just as I tell the Court now—

Mr. PRATT.—Q. What—

Mr. McGOWAN.—Let him finish his answer.

Mr. PRATT.—I didn't ask him for any conversation.

The COURT.—Have you finished your answer?

(Testimony of Edward Williams.)

A. No. After I left the bank, I went to Morgan & Litsey's. And I knew Morgan. I know him from Dome Creek, and he knows Mr. Richards. And I was telling him my situation and how I was fixed, and told him I had no power of attorney from Richards, but I would like to make a loan. And I told I also considered that Mr. Richards was my partner in the transaction. And he said, "Do you know Mr. Hurley?" I said [82] "No." He took me around and gave me an introduction to Mr. Hurley, and I told Hurley the conditions, and Mr. Hurley said, "I will think the matter over."

Mr. PRATT.—Q. Told him you had no power of attorney.

A. Who?

Q. Mr. Hurley? A. Yes.

Q. And Mr. Hurley said, "Well, it ain't business to let you sign these papers this way, but I will take a chance on you anyway."

A. Not at that time.

(Objected to, as assuming something not testified to.)

Q. Didn't Hurley say that when you told him that you didn't have any power of attorney?

A. That remark wasn't passed at that time at all.

Q. Was it made afterwards?

A. A remark similiar to that was made sometime afterwards.

Q. When? A. I can't just recollect.

Q. When do you say it was? You say it is similar. When was it?

(Testimony of Edward Williams.)

A. Something like that; that he would take a chance with me; take a chance on me or with me. I can't recollect just what he did say.

Q. Wasn't it to the effect that to let you sign Richards' name purporting to have his power of attorney when he knew you didn't have it, wasn't business with him?

A. That was three months after that transaction.

Q. Wasn't that the purport and meaning of it—that it was not business for him to allow you to sign up that way?

Mr. McGOWAN.—That was in reference to the mortgage, three months later. [83]

The COURT.—Answer the question.

Mr. PRATT.—Wasn't that the purport of it?

A. You can make that meaning out of it.

Q. Is not that the way you understood it?

A. Yes.

Q. Now, you say when you took the money over there to his bank you were going to deposit it there in the name of Edward Williams, were you not?

A. That I cannot say. I cannot say for sure.

Q. You cannot say? A. Not for sure.

Q. Is not that your best recollection—that that is what you intended to do when you took it over there?

A. I cannot say for sure.

Q. Have not you testified that the reason you did not was the suggestion of Mr. Hurley that you ought to put it in the name of both so that if anything happened to you, if you would die or anything, Richards could draw the money?

(Testimony of Edward Williams.)

A. Yes. Mr. Hurley made that suggestion.

Q. That is what caused you to put it in the name of Richards & Williams. A. I cannot say for sure.

Q. Is not that your best judgment now, and recollection, that that is what caused you to do it?

A. I cannot say.

Q. Mr. Williams, didn't you write this in your letter in regard to that matter—the letter of October 24, 1910, to Richards: "He," speaking of Hurley, "told me in case anything should happen, unless I deposited it in yours and my name you would have some trouble getting it, so I did as he advised, and signed the checks 'Richards & Williams' "?

A. Yes, I gave that as evidence, I think. [84]

Q. That is how that happened, wasn't it?

A. Yes.

Q. Now, you borrowed \$3,500.00 there, didn't you?

A. Yes, sir.

Q. And you signed these notes that have been introduced in evidence? A. Yes, sir.

Q. You borrowed that \$3,500.00 to pay for the half interest of Shively and Kennedy, didn't you?

A. Well, to help pay for it.

Q. You didn't have money enough without that loan to do that, did you? A. No, sir.

Q. You didn't pay Kennedy & Shively all of their \$4,500.00 purchased price in money, did you?

A. No, sir.

Q. You gave checks to people that they owed, didn't you? A. Yes, sir.

Q. You remember the checks that have been talked

(Testimony of Edward Williams.)

about here,—some of them? A. Yes, sir.

Q. You also gave one of those men—Kennedy—a note for a part of his interest? A. Yes, sir.

Q. In what amount?

A. Eight hundred and some odd dollars.

Q. Whose name did you sign to that note?

A. My own name.

Q. You didn't sign Richards' at all, did you?

A. No, sir.

Q. Why didn't you?

A. Well, I don't know hardly why I didn't. I didn't do it.

Q. You could get through with Kennedy and do business with Kennedy without it. He didn't lay down on you and make you do it.

A. No. He never asked it of me. [85]

Q. You couldn't have got the money of Hurley except by signing the firm name, could you?

A. I don't know.

Q. Did you try to get the money there on your own name? A. No, sir, not from Hurley.

Q. You knew then that Hurley knew Dick Richards, didn't you? A. Yes, sir.

Q. When you failed to get it at the Miners & Merchants' Bank and went over to Hurley, didn't you go there and tell him at once that Dick Richards was your partner?

Mr. McGOWAN.—We object to; "because he failed to get it at the Miners & Merchants' Bank."

(Sustained. Deft. excepts.)

Mr. PRATT.—Q. When you got through negoti-

(Testimony of Edward Williams.)

ating with the Miners & Merchants' Bank, isn't it true that you went to Hurley and told him that Dick Richards was your partner?

A. I did. I told him that he was my partner.

Q. That you wanted to borrow \$3,500.00 and if he would let you have it you would sign up a firm name?

A. I told him I would sign up a firm name?

Q. Yes.

A. No. I don't think I used that language.

Q. Didn't you tell him you would sign Dick's name to the paper?

A. I made that deposit there, and all the checks I issued I issued them in that name.

Q. Didn't you tell him that for this \$3,500.00 loan you would sign a note in the name of Richards & Williams?

A. Told him I would do that?

Q. Yes. Didn't you tell him you would do that, before he made the loan and before you got the money?

A. Yes [86]

Q. You bought the boiler sometime afterwards?

A. Yes.

Q. Who did you buy that of? A. Tom Aitken.

Q. For how much?

A. \$2,100. I think it is \$2,100.

Q. When did that happen?

A. That was shortly after I had made the purchase down there.

Q. \$2,100, was it, *that were* to give?

A. \$2,100 or \$2,200 for a 40 horse-power boiler.

Q. How much did you pay on that?

A. I paid \$700 cash.

(Testimony of Edward Williams.)

Q. That was out of this Richards money, wasn't it, or the money you borrowed?

A. From the bank account.

Q. What?

A. From the account I had in the bank.

Q. What did you do about the balance—the \$1,400.00, how did you arrange that?

A. Gave him a note, I think.

Q. Gave Tom Aitken a note?

A. I think so.

Q. For \$1,400.00? Who signed that note?

A. I did.

Q. Did Richards sign it? A. No, sir.

Q. He didn't have anything to do with it?

A. No, sir.

Q. Did you sign up any other notes down there after you bought in this three-quarters interest, half from Kennedy and Shively and a quarter from Boulton? Did you sign any more notes than the one to Kennedy and one to Aitken? Did you sign any more notes? A. I can't recollect. [87]

Q. You might have signed some more, might not you? A. I can't tell.

Q. Did you ever sign any other down there with Richards' name on it, except this one to the bank?

A. Not outside of the checks that I would issue on that account; not to my recollection.

Q. I am talking about promissory notes. Did you ever sign any promissory notes or contracts down there in the name of Richards & Williams, or put

(Testimony of Edward Williams.)

Richards' name onto such a paper at all, other than checks? A. Not that I can recollect.

Q. None except this one, and the mortgage to the bank? A. To the best of my recollection.

Mr. McGOWAN.—Do you include deeds in that? You said contracts.

Mr. PRATT.—Q. After you got this money, you closed up this deal, didn't you, with Kennedy and Shively? A. Yes, sir.

Q. And got rid of them? A. Yes, sir.

Q. And you took a bill of sale of their half interest? A. Yes, sir.

Q. And you took that in the name of Richards and Williams? A. The three-quarters.

Q. Had you discussed that with Richards in Hot Springs, that you were going to do such a thing as that? A. No, sir.

Q. You notified him, however, that you had done that, in your letter of October 24, 1910, didn't you?

A. Yes, sir.

Q. And you got a letter right back, that has been read here, dated December 8th, didn't you?

A. Yes, sir. [88]

Q. There is another letter that has been introduced in evidence and read, dated December 27th, in which he complains of fellows running after him for money. It speaks about Patton? A. Yes, sir.

Q. Doesn't that refer to a letter dated December 16th that Mr. Richards had written to you, and that you got in the Iditarod shortly after you got this one of December 8th?

(Testimony of Edward Williams.)

A. That I received a letter dated December 16th?

Q. Yes. In which he complained of you about leaving some debts there connected with that lease; that is, that Patton and Renza were after him about it, and he was grumbling about it?

Mr. CLARK.—We object, as there is no evidence of anything of that kind.

Mr. PRATT.—I cannot explain that letter of December 27th without some light being thrown upon it. There is a reference to another matter there.

The COURT.—Let the witness testify about it.

Mr. PRATT.—I asked him if he didn't get a letter dated December 16th, or about that, 1910.

A. I may have had those letters, but I can't recollect the dates.

Q. In which he made some reference to, and grumbled about, a man by the name of Patton and a man by the name of Renza coming after him for some of your mining debts in Hot Springs?

A. Yes, sir, he wrote a letter to that effect.

Q. Mr. Williams, isn't this true: That in that letter of December 16th, 1910, Mr. Richards used to you language in substance this: "I will not be responsible for any notes or whatever else you have signed my name to. Let me know as soon as possible if you have revoked the same"?

Mr. CLARK.—We object. There is no evidence that there was [89] any letter of that date, or that he received a letter of that date, and it is incompetent.

Mr. PRATT—Q. Didn't you acknowledge that

(Testimony of Edward Williams.)

you received a letter from him dated about December 16th?

A. I said I received other letters from Mr. Richards, but I don't remember the exact dates.

Q. Don't you know you received one dated shortly after this letter of Decembed 8th?

A. No, I don't, for a fact.

Q. Didn't you receive one in which he referred—that is the way I identify it—in which he referred to Patten and Renza? You remember that. Didn't that same letter contain this language: "I will not be responsible for notes or whatever else you have signed my name to. Let me know as soon as possible if you have revoked the same."

A. There was a letter with that sentence in. That is the Patten, not Renza.

Q. But this that I have read; that he would not be responsible.

A. There may have been something in it to that effect, but I wouldn't swear that that was identically what Mr. Richards wrote.

Q. Wasn't that the substance and meaning of what he put in that letter, the same letter that he referred to Patten and Renza?

Mr. CLARK.—We object as immaterial.

The COURT.—The witness can testify to his recollection about it.

A. I can't recollect receiving a letter written in that tone, with that sentence in it.

Mr. PRATT.—Q. Haven't you already testified

(Testimony of Edward Williams.)

that it was that substance and meaning in that same letter?

Mr. CLARK.—We object as that is for the jury to pass upon. [90]

The COURT.—Objection sustained.

Mr. PRATT.—Q. Wasn't that the substance and meaning—

The COURT.—The objection was sustained to that question.

Mr. PRATT.—Q. What, if anything, did he say in that particular letter about not being responsible for notes or anything that you had signed?

A. I can't recollect.

Q. Did he say anything?

A. I can't recollect of him saying anything about not being responsible, or to have them revoked, to the best of my knowledge.

Q. You will not deny that he used this very language I have read, in that same letter, will you: "I will not be responsible for any notes or whatever else you have signed my name to. Let me know as soon as possible if you have revoked the same"?

A. I cannot admit it.

Q. You will not deny that he used language similar to that?

A. I admit he used language—the chances—I admit there might have been a sentence in it to that effect, but I do not know that those were the words that Richards wrote to me and that I received.

Q. All right. We will let it go at that. You got three letters from him dated in December, on this

(Testimony of Edward Williams.)

same subject, did you not?

A. I do not know the exact dates of the letters.

Q. There are two right here that you produced here; one of date December 8th and one on the 27th, and you say you got one dated between that, along about the 16th?

Mr. CLARK.—He has not. (Objection sustained.)

Mr. PRATT.—Q. That is three letters, is it not?
[91]

A. I admit that I have had letters, but in reference to the dates—I admit I got other letters from Richards, than what has been produced, but in reference to the dates I don't know. I can't recollect the dates of those letters.

Q. In all three of those letters that you got from Richards, he denied that you had any right to sign his name to notes or mortgages, either one, didn't he?

Mr. CLARK.—We object, as the letters speak for themselves.

The COURT.—Objection sustained.

Mr. PRATT.—Q. Mr. Williams, when you were there talking with Mr. Hurley about borrowing this money and making this note, didn't he tell you that he wanted you to write to Mr. Richards and tell him about it, that is, that you had signed his name, and see if he was satisfied?

A. I think I told Mr. Hurley myself. Mr. Hurley may have suggested it, but I think I told him myself that I would write myself and tell Mr. Richards what I had done.

Q. Did he ask you also, when you got a reply from

(Testimony of Edward Williams.)

Richards to let him know what it was?

A. I told him I would let him know.

Q. Didn't he ask you to do that?

A. I couldn't say as to that.

Q. Is not that your best recollection; that he did request you to do that?

A. I couldn't say, to be positive about it.

Q. He might have suggested that to you, that he would like to have you convey the contents of Richards' letter to him? A. He may have suggested it.

Q. When did you get Richards' letter?

A. I don't know the exact date when I got that.

Q. What month? [92]

A. I got the first one—it was brought down by Johnny Johanson, if I recollect right. He brought me a letter.

Q. Did you get any of them before that note fell due on the 6th of January?

A. Yes. I think I did.

Q. You think you did?

A. Yes. I wouldn't be absolutely certain.

Q. You got some after it fell due, didn't you?

A. Yes. I had several letters from Mr. Richards.

Q. It fell due on the 6th of January, 1911?

A. That is supposed to be the date, I think.

Q. You gave this note in suit here—the last note—February 24, 1911, didn't you? A. Yes, sir.

Q. That is going on two months after, isn't it?

A. Yes, two months.

Q. Did you have any conversation with Hurley in the meantime?

(Testimony of Edward Williams.)

A. I think I went into the bank one day and told him I had not got the money and Mr. Richards said he would not do any more at present.

Q. When did you go into the bank and tell him that? A. Sometime after the note was due.

Q. About how long, as near as you can remember?

A. I can't recollect just how long.

Q. It was very shortly after it became due?

A. It may have been.

Q. Did you tell him anything else that Richards had informed you in the letter?

A. Not to my recollection.

Q. Did you tell him that Richards had written to you in one letter and said that he would not be responsible for any notes or whatever else you had signed his name to and, [93] if you had signed any, to revoke them?

A. I don't think I ever made that assertion to Mr. Hurley.

Q. You didn't tell him that?

A. Not to my knowledge.

Q. But you told him Richards was dissatisfied with you for using his name.

A. I don't know as I told him about using the same. I told him he said he would not do any more at present.

Q. Answer me a question straight. Didn't you tell him in substance that Richards was dissatisfied and denied your right to sign his name?

A. No. I didn't tell Mr. Hurley that.

Q. Or anything like that?

(Testimony of Edward Williams.)

A. I may have said something—

Q. You may have said something like that?

A. Not in that way.

Q. What way would it be in?

Mr. McGOWAN.—I object to that as not cross-examination and incompetent, and already answered.

Mr. PRATT.—Q. How many conversations would you say you had with Mr. Hurley after that note became due, until you gave this note that is in suit here?

(Objected to as not cross-examination, irrelevant and immaterial. Objection overruled.)

A. I can't recollect.

Q. More than one?

A. No, I don't think so. Not up to the time—

Q. You don't think so?

A. Not until the time I performed the other transaction; carried out the other business.

Q. Mr. Hurley was either talking to you or sent you word that [94] you had to do something with this debt of \$3,500.00, didn't he, after it became due? A. Oh, yes. I was informed.

Q. How were you informed; by a letter?

A. No.

Q. How were you informed?

A. I had to make a change when Richards didn't want to go into it—didn't want to stay in the transaction, and I told Mr. Hurley that under the conditions I would have to get some other partner in.

Q. When did you tell Hurley that?

A. Sometime in February, I suppose.

(Testimony of Edward Williams.)

Q. What did Hurley say to that?

A. Oh, I don't remember just what Mr. Hurley said.

Q. He was willing for you to do that?

A. He had a mortgage on the ground at the time, and expected to have a mortgage—(interrupted).

Q. Didn't he tell you that he was willing to release Richards if you would give a new note and give a mortgage on that lay over there on that Flat Creek property?

A. I understood that when I got the bill of sale from Mr. Richards that there was to be another transaction take place and that would release Mr. Richards of all obligations.

Q. Hurley wanted you to send down there and have Richards to deed to you so that you would have the full legal title to that three-quarters interest?

A. I can't say that Mr. Hurley asked me to do that.

Q. You and Hurley agreed that you were to do that? A. Not necessarily, but me.

Q. You told Hurley you would do that?

A. I told him I would. [95]

Q. When? A. It was some time in February.

Q. Did you send a form of a bill of sale and transfer up here to Hot Springs for Richards to sign, conveying his interest in that three-quarters interest in that lay back to you? A. Yes, sir.

Q. That was before this note in suit was signed at all, wasn't it, before the 24th of February?

A. I can't recollect whether it was before, or just about the same time.

(Testimony of Edward Williams.)

Q. You told Hurley that Richards wouldn't have anything to do with it; that you had to get somebody else in there with you?

Mr. CLARK.—We object, as he didn't make any such statement.

(Objection sustained.)

Mr. PRATT.—Q. Did you make any arrangement with anybody else to buy an interest there, and, if so, who?

A. To buy an interest in that ground?

Q. Yes. A. I was making arrangements.

Q. Who with? A. McKenzie and McLarren.

Q. When?

A. Some time about the 20th of February, somewhere along there.

Q. This note in suit was on the 24th. Was it before that?

A. I don't know when the note was given.

Q. Did you notify Mr. Hurley of the negotiations with McKenzie & McLellan?

A. I think I mentioned it to Mr. Hurley.

Q. He asked you to do that, didn't he?

A. I can't say that.

Q. He agreed on that then, that you might give a new note, but he wanted a mortgage on that Flat Creek property?

A. They wanted a mortgage. [96]

Q. They wanted you to send to Richards and get a conveyance back that would make the title clear as to you. Hurley wanted you to do that?

A. That is what it would mean, because I don't

(Testimony of Edward Williams.)

think Hurley suggested it, though. I took that matter upon myself.

Q. When you suggested that matter to him, he was satisfied; he wanted it that way?

A. Certainly. He took the mortgage. I gave him the mortgage.

Q. Didn't Hurley agree with you that if you would give a new note and a mortgage, and get Dick Richards to make a conveyance to you, that he would release Richards?

A. Well, I understood that. That was my—(interrupted).

Q. That was before this note of February 24th was signed that all that happened, wasn't it?

The COURT.—What do you refer to?

Mr. PRATT.—His talk with Hurley.

A. I talked the transaction over with Mr. Hurley.

Q. Before this note that is in suit, of February 24th, was signed up?

A. I couldn't state positively.

Q. I want to show you a certified copy of a mortgage, and I will ask you to examine it and see if that is the mortgage you gave at that time. (Hands same to witness.) A. I can't identify that.

Mr. PRATT.—I want to read this as a part of his cross-examination.

Mr. McGOWAN.—We admit that is a copy of the mortgage. Do you (to Mr. Pratt) offer it in evidence?

Mr. PRATT.—Yes, I do, as a part of his cross-examination.

(Marked as Defendant's Exhibit 1, and read in evidence, being in the words and figures following, to wit:) [97]

**Defendant's Exhibit 1 [Certified Copy of Mortgage,
Dated February 24, 1911, Edward Williams et al.
to American Bank of Alaska].**

CERTIFIED COPY OF MORTGAGE.

EDWARD WILLIAMS

EDWIN RICHARDS

to

AMERICAN BANK OF ALASKA.

#6589.

THIS INDENTURE made and entered into this Twenty-fourth day of February, nineteen hundred and eleven, by and between EDWARD WILLIAMS and EDWIN RICHARDS, parties of the first part, and the AMERICAN BANK OF ALASKA, a corporation, of the Town of Iditarod, Alaska, party of the second part.

WITNESSETH: That the said first parties for and in consideration of the sum of Thirty-five Hundred Dollars (\$3500) gold coin of the United States to them in hand paid the receipt whereof is hereby acknowledged, do, by these presents, grant, bargain, sell, convey and quitclaim unto the said party of the second part, and to its successors and assigns, the entire joint and several interests of the said first parties in the following described premises, to-wit: The lay or lease on the lower five hundred (500) feet of the WILDCAT Association Placer mining claim, on Flat Creek, a tributary of Otter Creek in Otter Recording District, Territory of Alaska, known as the

“Bolton” lay. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

This conveyance is intended as a mortgage to secure the payment of the sum of Thirty-five hundred dollars (\$3500) gold coin of the United States, on or before July First, nineteen hundred and eleven, together with interest thereon in like gold coin at the rate of twelve per cent per annum payable annually, from the date hereof until paid, according to the terms [98] and conditions of one promissory note bearing even date herewith, made by the said first parties payable to the order of the said second party; and these presents shall be void if such payment be made according to the terms and conditions thereof. But in case default be made in the payment of the principal or in the interest of said promissory note, or any part thereof, when the same shall become due and payable according to the terms and conditions thereof, then the said second party, its successors and assigns are hereby empowered to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, to retain the whole of said principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale on demand, to the said first parties, their heirs or assigns. Said promissory note is in words and figures following, to wit:

Iditarod, Alaska, Feb. 24, 1911.

\$3500.

On or before July 1, 1911, after date, I promise to

pay to the order of American Bank of Alaska, at its office in Iditarod, Alaska, Thirty-five Hundred Dollars, for value received, with interest after date at the rate of Twelve per cent per annum until paid. Principal and interest payable only in U. S. Gold Coin of the present standard of weight and fineness. For value received, each and every party signing or endorsing this note hereby waives presentment, demand protest and notice of non-payment thereof, binds himself thereon as principal not as surety, and promises, in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the court may adjudge reasonable as attorney's fees in such suit.

(Signed) EDWARD WILLIAMS. (Seal)

EDWIN RICHARDS. (Seal)

By EDWARD WILLIAMS,

His Attorney in Fact.

RICHARDS & WILLIAMS,

By EDWARD WILLIAMS.

IN WITNESS WHEREOF the said first parties have hereunto set their hands and seals this the day and year first above written.

EDWARD WILLIAMS. (L. S.)

EDWIN RICHARDS. (L. S.)

By EDWARD WILLIAMS,

His Attorney in Fact.

Executed in presence of

GREG STEWART,

GEO. W ALBRECHT,

Who subscribe as witnesses to both signatures.

On this Twenty-fifth day of Feb., 1911, before me, Geo. W. Albrecht, a Notary Public in and for the Territory of Alaska, personally appeared Edward Williams, to me known to be the individual described in and who executed the within mortgage and acknowledged [99] the execution thereof; also appeared the said Edward Williams and acknowledged that he signed the name of Edwin Richards as principal and his own name as attorney in fact and that he executed the within mortgage.

[Seal] GEO. W. ALBRECHT,

ALFRED E. MALTBY,

Recorder. [100]

CERTIFICATE

United States of America,
District of Alaska,
Division No. 4,
Otter Precinct,—ss.

I, Geo. W. Albrecht, Commissioner and Recorder for Otter Precinct, 4th Division, Territory of Alaska, hereby certify that the foregoing and hereto attached three pages of typewritten matter, numbered from 1 to 3, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of instrument No.

(Testimony of Edward Williams.)

6589, a mortgage from Edward Williams and Edwin Richards to American Bank of Alaska, as the same appears of record in my office in Volume "C" of Mortgages, page 171; that I have carefully searched all the indexes and all the books of record containing records of mortgages and that the foregoing is the only mortgage which I find of record in 1911 or later which is made by Jack Boulton, Edward Williams, McKenzie and McLaren, or any of them, running to the American Bank of Alaska, or to anyone else in the amount of \$3,500.00.

IN WITNESS WHEREOF I have hereunto set my hand and seal of office this 24th day of July, A. D. 1913.

GEO. W. ALBRECHT,
Commission and Ex-officio Recorder Otter Precinct,
Territory of Alaska, 4th Division.

[Indorsed]: #1815. Defts. Ex. 1. Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [101]

Mr. PRATT.—Q. Where did you mine that summer of 1911? A. On Flat Creek.

Q. On this same ground? A. Yes, sir.

Q. Who were your partners?

A. McKenzie, McLarren and Boulton.

Q. Did you mine pretty extensively there all summer? A. Yes, for a time; not all summer.

Q. That proved to be disastrous? A. Yes, sir.

Q. Did you pay some on this debt, or any?

A. I paid \$1,000.

Q. To this bank? A. Yes, sir.

(Testimony of Edward Williams.)

Q. Were they after you for the balance of it during the summer? It came due on the first, didn't it? On the 1st of July? A. Yes, sir.

Q. Were not they pressing you for payment after that? A. No, not in particular.

Q. Your lay looked good until pretty late in the season, didn't it?

A. Until the latter part of August or middle of August.

Q. Up to that time the cleanups were pretty satisfactory? A. They were fair.

Q. What did it go to the foot?

Mr. McGOWAN.—We object as immaterial.

A. I could hardly tell you.

The COURT.—What is the purpose?

Mr. PRATT.—I want to show that Mr. Hurley was posted on that ground and depending on this mortgage to release Mr. Richards altogether.

Mr. CLARK.—That is not the way to show it.

The COURT.—I do not think that is cross-examination. Objection sustained.

(Deft. Richards excepts.) [102]

Mr. PRATT.—Q. When did you close down and quit there? A. About the first of September.

Q. And you came off up here? A. Yes.

Q. You got the telegram that was introduced in evidence, asking you to go and buy some ground from Curran, from Richards? A. Yes, sir.

Q. That was a piece of ground over here on Dome Creek? A. Yes, sir.

Q. Curran, the owner of it, happened to be down there? A. Yes, sir.

(Testimony of Edward Williams.)

Q. And Dick Richards wanted to buy it for himself or somebody else. Who did he want to buy it for?

A. I judge from the telegram, for himself.

Q. Anyway, you transacted that business for him?

A. Yes, sir.

Q. That was all there was to that?

A. Yes, sir.

Q. Were you visited by some agent of the bank out there on Flat Creek before you left? A. Yes, sir.

Q. What was his name? A. Adams.

Q. Do you know his first name? A. No, sir.

Q. What was he, the gold-dust collector?

A. He was, in the early part of the season. He had charge—I don't know whether he had charge, but he was in the bank at Flat City.

Q. The branch of the American Bank of Alaska at Flat Creek? A. Yes, sir.

Q. He is the man who collected the gold dust for the American Bank of Alaska during that season?

A. He was in the bank. He didn't go around collecting it, I don't think, at that time. [103]

Q. What did he come out there to see you about?

A. I guess he came out to look the matter over.

Q. To look at conditions?

A. I don't know exactly what he came for.

Q. When did he come there?

A. I can't tell you the exact date, or time.

Q. What month, or how long before you closed down?

A. We were closed down when he came out.

Q. At that time, the American Bank of Alaska

(Testimony of Edward Williams.)

knew you had gone broke, didn't they?

A. Well, I guess they did. They pretty near all knew it.

Q. And you hadn't paid that note in full, and you couldn't pay it. Is that right? A. Yes, sir.

Q. They then sent this man Adams out there to see what they could do to stick Dick Richards?

Mr. McGOWAN.—We object.

The COURT.—Sustained.

Mr. PRATT.—Q. What did he come there for? What did he inquire for when he got there?

(Objected to as already gone over.)

Q. What did that man come there at that time for particularly?

Mr. CLARK.—We object as asked and answered.

Mr. PRATT.—He is the agent of this bank, and we want to show what he got. He got something from him, and I know what he got.

Mr. CLARK.—I withdraw the objection.

A. I don't know whether he came for that purpose alone.

Mr. PRATT.—Q. What did he say he came for?

A. Mr. Hurley at one time asked me if I had any correspondence with Richards, if I had had any. I told him I thought I had a letter or two. Mr. Adams came out there at that time, and that is the time he asked me if I had the letters.

Q. How long was it before Adams came after Hurley made this [104] request of you?

A. I cannot say how long.

Q. Shortly before?

A. It couldn't have been very long.

(Testimony of Edward Williams.)

Q. How many letters of Richards' did you give to this man Adams?

A. Two or three. I can't state.

Q. Don't you know that you gave him the two that have been read here in evidence, one dated December 8th and the other dated December 27th?

Mr. McGOWAN.—We object, as he already stated we got those letters from him. (Objection overruled.)

Mr. PRATT.—Answer. Don't you know that you gave him those two letters of Richards; the letters dated December 8th and December 27th?

A. Yes. I gave him some letters.

Q. Those two letters. Now, you had in your possession at that time this letter of December 16th, didn't you, that made the reference to Patten and Renza?

A. No, I can't say for sure whether I had or not.

Q. You didn't give that to Adams, anyway, did you?

A. I don't know if I had it in my possession at that time.

Q. I ask you to consider again. Did you give that letter of December 16th to Adams?

A. I don't know that I gave to Adams any more letters than what has been produced in court.

Q. Then, you admit that you gave him two of Richards' letters? A. Two or three.

Q. I want a straight answer, if you can give it. Did you give Adams that letter of December 16th?

Mr. CLARK.—We object because there is no tes-

(Testimony of Edward Williams.)

timony that there was any letter of December 16th.

[105]

The COURT.—Objection sustained.

Mr. PRATT.—I will put it: Q. Did you give Adams the letter that made reference to Patten and Renza? A. I don't know.

Q. Don't you know that you did not give it to him? A. I didn't give it to him?

Q. Don't you know that you did not?

A. I can't say. I don't know if I had the letter in my possession, at that time.

Q. If you did, you haven't seen it since, have you?

A. No.

Q. When you came up to Hot Springs, didn't you take that letter with you?

A. I can't say. I may have.

Q. Isn't it true that you didn't give it to Adams because it was very much in Richards' favor, strong in his favor?

Mr. McGOWAN.—We object—

A. I don't know whether I had the letter or not.

Mr. McGOWAN.— —as calling for the witness' conclusion. (Objection sustained.)

Mr. PRATT.—Q. That letter of December 16th, or about that date, that referred to Patten and Renza, didn't you withhold it from Adams and carry it back with you up to Hot Springs?

A. I gave those people all the letters I had in my possession, to the best of my knowledge, at that time when they asked me for the correspondence of Mr. Richards.

Q. When you got to Hot Springs, didn't you have

(Testimony of Edward Williams.)

that letter in your possession?

A. I cannot say.

Q. You might have had it?

A. I might have had it, certainly.

Q. Didn't you burn that letter up down here in the Hot Springs? [106]

A. I didn't burn that letter.

Q. Didn't you burn that letter up, of Mr. Richards, up there?

A. I had letters from Mr. Richards when he was outside.

Q. Didn't you burn one particular letter that was favorable to him, down there in Hot Springs after you got back?

A. Not to my knowledge. If I did, I didn't do it intentionally.

Q. I want to call your attention to what you testified once before about that. Did you give this testimony at the second trial: "Q. Didn't you get another letter from him dated about the 16th of December, and didn't you get that in about thirty days, in which he stated this to you: 'I will not be responsible for any notes or whatever else you have signed my name to. Let me know as soon as possible if you have revoked the same?' "

A. What is the question?

Q. Didn't you receive a letter from Mr. Richards dated about the 16th of December, in which he referred particularly about you using his name down there, and said he would not be responsible, using in substance this language—Objection—"I will not be responsible for any notes or whatever else you have

(Testimony of Edward Williams.)

signed my name to. Let me know as soon as possible if you have revoked the same." That is after he got this letter of October 24th.

A. I can't recollect of—Interrupted—I can't recall ever receiving a letter that was written in that tone.

Q. Wasn't it that meaning and substance?

A. There may have been a letter written in the same tone as the one that has been introduced in court.

Q. Wasn't it a great deal stronger and plainer?

A. I won't admit it.

Q. And you don't deny it. A. No, sir.

Q. What became of that letter?

A. I don't know, sir.

Q. In the fall of 1911, isn't it a fact that you concluded [107] (continues reading) that you might get yourself in trouble?

A. Oh, I undoubtedly considered the position I placed myself in.

Mr. McGOWAN.—We object to all this.

Mr. PRATT.—I have some more to read.

The COURT.—Get to it, then.

Mr. PRATT.—(Reading:) "Q. Did you go to Mr. Hurley or plaintiff's attorneys and deliver all the letters you had in your possession that you had ever gotten from Mr. Richards? A. No, sir.

Q. You didn't deliver all of them? Didn't you give them some letters?

A. I gave them no letters.

Q. None of them? A. No, sir.

Q. How did they get them to bring them here in

(Testimony of Edward Williams.)

court? A. Mr. Adams got them from me.

Q. Is that Mr. Adams on Flat Creek in the Iditarod? A. No, sir.

Q. Where was it? A. At Flat Creek.

Q. That was in the fall of 1910?

A. 1910 or 1911.

Q. It was in the fall—”

Mr. CLARK.—We object. (Objection sustained.)

Mr. PRATT.—Further on (reads): “Q. Have you got any of Richards letters in your possession yet? A. I may have one.

Q. Where is it? A. At Hot Springs.

Q. That is the same letter, ain't it? Did you then speak about that letter? A. No, sir.

Q. You are sure of that? A. Certainly.

Q. Didn't you destroy that letter of December 16th yourself?

A. Not willingly, if I did.”

Q. Did you so testify at the second trial?

Mr. McGOWAN.—I object to the question on the ground it is not an impeaching question.

The COURT.—The objection is sustained.

Mr. PRATT.—He is trying to deny now that he burned that letter and here he admits it.

Mr. McGOWAN.—That remark is not fair or proper.

The COURT.—That is not a proper remark.
[108]

Mr. PRATT.—Q. I am asking you if that was not your testimony, at the present time.

A. I never admitted that I burned that letter.

(Testimony of Edward Williams.)

Q. I have read your testimony and quoted it accurately.

A. I said, if I did I didn't do it intentionally. It does not say that I did it.

Q. About the time Adams was over there you felt some apprehension that you might be prosecuted criminally for forgery in this connection?

Mr. CLARK.—We object as immaterial and not proper cross-examination. (Argument. Objection withdrawn.)

Mr. PRATT.—Add to that: In connection with making that note and mortgage that is sued on here, or the note, rather.

A. Well, I certainly figured that I placed myself in a delicate position. I have got to admit that, I think I mentioned that in the letter to Mr. Richards after he objected.

Q. You mean by that that you had a little apprehension down on Flat Creek in the fall of 1911 that the bank might prosecute you criminally for signing Richards' name to that note. Is not that true?

A. I don't know whether I thought that or not.

Q. Haven't you said so in some of these letters?

Mr. McGOWAN.—Mr. Pratt knows that is improper.

The COURT.—Certainly that is improper.

Mr. PRATT.—Q. You thought on that subject?

A. I couldn't help but give it a thought.

Q. Did anybody from the bank, so far as you know, suggest it to you? A. No, sir.

(Testimony of Edward Williams.)

Q. Not at any time? A. No, sir.

Q. Not here in Fairbanks? A. No, sir.

Q. None of the attorneys for plaintiff?

A. No, sir.

Q. You and Richards had considerable correspondence about this [109] matter of your signing his name to those notes and that mortgage, and a number of letters you wrote that have not been read to-day?

(Plaintiff objects as not the best evidence. Overruled.)

A. I don't know.

Q. I said, besides the ones that have been read here, didn't you write Richards a number of letters besides the ones that have been introduced in the trial?

A. There has just been one of my letters read at this trial.

Q. One? A. One or two.

Q. Is it not true that at the first trial I was trying to get out of you if it was not true that you wrote Richards a number of letters in the fall of 1910 and during 1911?

A. We had considerable correspondence.

Q. There must have been half a dozen or a dozen?

A. I couldn't say.

Q. What would be your idea; a half a dozen?

A. I have not any idea as to the number.

Q. Don't you know that at the first trial there were five or six of your letters read that were introduced by the plaintiff?

(Testimony of Edward Williams.)

Mr. McGOWAN.—We object to that as not proper cross-examination, and that the records are the best evidence, and that it is not competent. (Objection sustained. Deft. Richards excepts.) We admit that is in the handwriting of Mr. Williams.

Mr. PRATT.—I want to read it to the jury as a part of his cross-examination.

Mr. McGOWAN.—We object as irrelevant, incompetent and immaterial, and not proper cross-examination.

Mr. PRATT.—Here is a letter this man wrote that this plaintiff introduced in evidence twice himself.

The COURT.—If you have anything to show whether it is competent [110] evidence, state it.

Mr. PRATT.—There are two reasons: One, that whenever a party produces a paper in evidence, he vouches for the truth of that, and it can be used always, every time, by the opposition.

The COURT.—If it has something to do with the case.

Mr. PRATT.—Certainly it must have relation having relation to this same transaction, and making expressions there that puts him in an attitude quite different from the letters they have introduced in evidence.

The COURT.—That is not a matter for you to testify concerning. The letter shows what is in it.

Mr. PRATT.—Will the Court read it?

The COURT.—You can put the question in the usual way.

Mr. PRATT.—Q. I will ask you if, in this letter

(Testimony of Edward Williams.)

I hold in my hand, admitted to be in your handwriting, dated April 4, 1911, addressed to "Friend Dick," signed by yourself, if you did not use this language—

Mr. CLARK.—We object, as the instrument is the best evidence.

Mr. PRATT.—I know it ought to be introduced, but I will read the extracts, and we will get that much of it.

Mr. CLARK.—We object as not proper cross-examination.

The COURT.—Mr. Pratt claims some of it is contradictory of some testimony given here.

Mr. PRATT.—Q. I will ask you if you didn't in that letter use this language (reads): "Well Dick I assumed the responsibility of this proposition doing as you advised me to do; consider you out of it. I was compelled to sell half interest to secure the note I gave last fall. In purchasing it last fall I had the bill of sale recorded in yours and my name, but I cannot cancell the note till you send me the bill of [111] sale which you will find enclosed. Then you will be relieved of all obligations in connection with the proposition." Did you write that to Mr. Richards? A. I did.

Mr. CLARK.—We object as not in contradiction of anything he has testified to in the present trial. (Argument.) I object that it is irrelevant, incompetent and immaterial.

Mr. PRATT.—There is another reason why it should be received: they introduced the letter of December 26th, and this letter I offer is in answer to

(Testimony of Edward Williams.)

that letter. And where a letter is introduced, the answer is part of the same transaction.

The COURT.—Not unless it has some bearing on the transaction, and I do not see where the contradiction appears. (Argument.)

Mr. PRATT.—Q. I will ask you if, in that same letter, you did not say this (reads): “Kindly send the enclosed bill of sale so that I can relieve you of all obligations. If you want some security for the money you gave me I can give you the quarter interest which I still hold.”

Mr. CLARK.—I object as not contradicting anything he has testified to to-day, and not cross-examination.

Mr. PRATT.—This says in effect that he owes Richards that money that he got from him, and he is willing to give him security for it if he wants it. We are certainly entitled to that.

Mr. CLARK.—We object as immaterial, not cross-examination, and not contradictory.

The COURT.—Objection sustained.

Mr. PRATT.—We except.

Mr. PRATT.—Q. This letter of June 27, 1911, is that your handwriting? (Hands paper to witness.)

A. Yes, sir.

Q. See if you signed it there?

A. That is my signature. [112]

Mr. PRATT.—(To Mr. McGowan.) You know what that letter is. (Hands same to McGowan.)

Mr. McGOWAN.—We object to that as irrelevant, incompetent, immaterial and not proper cross-examination.

(Testimony of Edward Williams.)

Mr. PRATT.—That whole letter ought to go in. If the Court would read it, it will see that it is not in line with his testimony in some respects; in others it might be.

The COURT.—Anything in it that you claim is contradictory, you know how to put the question.

Mr. PRATT.—Q. I will ask you if it is not true in that letter of yours to Richards of June 27, 1911, you didn't use this language (reads): "The Guggenheims are in camp—they have options on most of Flat Creek. We let them an option for \$33,000. They also take all machinery and wood at cost price and also pay all running expenses if they take it up, which expires August the 1st. They are certainly doing some prospecting. They have in their employment about 150 men sinking holes which demonstrated they intend giving it a good test. Should they take it up I will come direct to the springs and make good." Did you write that?

Mr. McGOWAN.—We object as irrelevant, incompetent and immaterial, not proper cross-examination, and not in any way impeaching or contradicting the testimony of this witness.

The COURT.—What is the purpose of that?

Mr. PRATT.—It contradicts him. (Argument.)

The COURT.—As I understand counsel, this is offered to contradict the witness, and I do not see that it contradicts him, and I do not see that it is proper cross-examination. The objection will be sustained. (Deft. Richards excepts.)

Mr. McGOWAN.—We will withdraw our objec-

tion to that letter of April 4, 1911.

The COURT.—It may be admitted.

(Marked as Defendant's Exhibit 2 which exhibit was read and is in words and figures as follows, to wit:) [113]

Defendant's Exhibit 2 [Letter, Dated April 4, 1911, Ed. Williams to "Dick"].

Flat Creek, Iditarod, April 4, 1911.

Friend Dick:

I would have written before but have been waiting to see how things would materialize. I intended sending a letter with Joe Barker. He promised to call for it but he never came and disappointed me. Well Dick I assumed the responsibility of this proposition doing as you advised me to do; consider you out of it. I was compelled to sell half interest to secure the note I gave last fall. In purchasing it last fall I had the Bill of Sale recorded in yours and my name, but I can not cancell the note till you send me the Bill of Sale, which you will find inclosed. Then you will be relieved of all obligations in connection with the proposition. Angus McKenzie and Angus McLellan are the parties that I sold to. I got \$4500, for the half interest in the lay just enough cash down to pay the back interest on the note \$400., and giving a mortgage till July 1st, 1911. They are to put machinery, wood and lumber. We have between 400 and 500 cords of wood on the ground, 9000 ft. of lumber. It is all four foot wood costing about \$19.00 per cord. The lumber \$150 per thousand. No machinery of any account excepting the boiler as yet and grub you cant hardly afford to buy as it

is so high. I think this is the most expensive camp ever struck in Alaska. You mentioned in *you* of your letters that I never in particular referred to what this ground would go to the foot. If I never mentioned it, it must have been an oversight on my part as I thought I told you. It is impossible to give a correct idea, but I think I would be safe in saying between \$3 and \$4 for a 100 or 74 ft. wide. I don't think it will go any less and it may go more. It is almost impossible to tell by any hole as it is all wet ground and keep running in just as fast as you take it out. But I am quite confident that we will make some money.

How is it going with you Dick. Have you struck anything yet? And how is things looking around the Springs? Is your head giving you trouble yet? How is Bob and Morris and Carl and Louie? Give them all my regards. Tom Williams is still in the Kuskokwim. I have never see him since I came down here. Carl Ramstead as a good piece of ground. He was offered \$4000., 7000 cash, but wants 50,000 ten thousand cash. Frank Hedstrom as a lay on the same Creek, but does not amount to much. The above ground is located on Otter Creek about 2 miles above the mouth of Flat. Kindly send the inclosed Bill of Sale so that I can relieve you of all obligations. If you want some security for the money you gave me I can give you the quarter interest which I still hold. Hoping this will be satisfactory to you, I remain,

Ever your truly,

ED. WILLIAMS,

Iditarod, Alaska.

Shorty Williams *as* pretty fair pay on Quartz Creek in the Kuskokwim.

Part of the Iditarod City was burned today.

[Indorsed]: #1815. Deft's. Ex. 2. Third Trial. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 25, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [114]

Mr. PRATT.—Will you withdraw your objection to this one of June 27, 1911?

Mr. McGOWAN.—Positively we will not.

Mr. PRATT.—I will ask to have this filed and marked for identification.

The COURT.—It may be marked for identification.

(Marked Defendant's Identification No. 3.

Mr. PRATT.—We take an exception to the court refusing to admit this (refers to Deft's. Identification 3) in evidence.

The COURT.—Very well. Letter marked Defendant's Identification No. 3, which letter is in words and figures as follows, to wit: [115]

Defendant's Exhibit 3 [Letter, Dated June 27, 1911, Ed. J. Williams to "Dick"].

Defendant's Identification "3."

Iditarod, Alaska, June 27, 1911.

Friend Dick:

Your kind letter of May the 17th received a few days ago and I assure you I was glad to hear from you and I must thank you for sending me the deed. I was somewhat worried as I feared it had been lost on account of not hearing from you for such a long

time. It was also reported around hear that you had gone outside on account of the accident you meet with last summer, so you can imagine how pleased I was to hear from you and that you were in good health and judging from the tone of you letter, doing fairly well at the mining.

About this proposition—it is looking pretty good but it is very expensive to work. We had a cleanup on June the 22nd—cleaned up 700 oz. The gold is worth 17 50/100 per oz. It goe about 3½ to the foot. We have 45 men working for us. I was doing the cooking, but it was to much for me so I quit it and am now working in the dump box. It is very hard ground to wash. We have three men in the dump box. We dump it on a flat apron and use a three inch pump to wash it into the dump box. The pay is from seven to nine feet in depth and from 16 to 18 ft. to bedrock, which make it rather expensive to work. We are away ahead of any on the creek and our cleanup the begest in the camp yet. Of course none of the bigger plants such as Tom Aitken, Doc Madden and Geo. Friend are doing much yet. They are using the Bagely scraper for stripping but it is not giving very good satisfaction and I think they will discard it before long. The season is very backward in this part of the country—lots of snow on the hills and I think the worst climate in all Alaska. The Guggenheims are in camp—they have options on most of Flat Creek. We let them an option for \$33,000. They also take all machinery and wood at cost price and also pay all running expenses if they take it up, which expires August the 1st.

(Testimony of Edward Williams.)

They are certainly doing some prospecting. They have in there employment about 150 men sinking holes wich demonstrated they intend giving it a good test. Should they take it up I will come direct to the spring and make good. Tom Williams went to the Ruby Creek strike. He didn't find much in the Kuskokwim. Well, Dick, should you see Morrison tell them I will settle just as soon as I possible can. They wrote me a letter stating that Roden was there agent for the Iditarod and that they hoped I could make a payment July the first. But I can't see my way clear to pay it at that date, but will just as soon as I possible can. I must now close hoping that you are enjoying good health and making good. Give my regard to Bob, Carl, Sam and Louise,

I remain,

Yours sincerely,

ED. J. WILLIAMS.

Flat Creek, Wild Cat Asso.

[Indorsed]: #1815. Third Trial. Deft's. Ident.
"3." Mar. 25, 1914. P. R. W. [116]

I stated that I told Mr. Hurley down there, when I was making this note —the first one that Dick Richards was my partner. I can't recollect that I stated to Hurley that I wouldn't sign his name to notes.

Mr. PRATT.—Now, sir, I would ask you to state if you didn't write in your letter to Richards, dated Oct. 12, 1911, and use this language: "The mortgage was \$4500, as you will see by the agreement I paid \$1000.00 leaving \$3500, with interest to be paid, I have no idea what the consequences will be. Any

(Testimony of Edward Williams.)

liberties that I assume in using your name be it legal or illegal, I did it for what I thought best. I will not write any more till I hear from you." Did you write that in your letter?

A. I did write that. [117]

Mr. PRATT.—Here is a letter dated January 20, 1912, addressed to "Friend Dick," signed "Sincerely yours, Ed J. Williams."

Mr. McGOWAN.—We admit he wrote it.

Mr. PRATT.—Q. This is your handwriting?

A. Yes, sir.

Mr. PRATT.—We offer to read this in evidence as a part of his cross-examination. We offer it as a contradiction of his testimony in some respects.

Mr. CLARK.—To which we object as irrelevant, incompetent and immaterial.

Mr. PRATT.—This is a letter that is a modification—(interrupted).

Mr. McGOWAN.—We object to that in the presence of the jury.

The COURT.—Objection sustained.

Mr. PRATT.—We except. Now, then, didn't you state in that letter, in the first paragraph of that letter, as follows (reads): "Friend Dick: Your letter of Dec. 27th received a few days ago, and judging from the tone of it I know how you feel about the matter. I can't deny but what you are justified in looking at it as you do. As for myself I am placed in a rather delicate position and what the result will be I cant say."

Mr. McGOWAN.—We object as not proper cross-

(Testimony of Edward Williams.)

examination, irrelevant, incompetent and immaterial, not an impeaching question, and not by way of impeaching the testimony of this witness, or tending to.

Mr. PRATT.—It amplifies and explains.

The COURT.—I do not see that that explains anything.

Mr. PRATT.—And modifies a number of his statements.

The COURT.—If you want to cross-examine him in regard to that statement, you may do so.

Mr. PRATT.—Q. I ask you if you made that statement in your letter to Mr. Richards?

A. I wrote him the letter, yes, sir. [118]

Q. The letter of January 20, 1912, that we were just talking about?

A. Where is that dated?

Q. It is not dated from any place. I want that marked. A. I mean the place I wrote it from.

Mr. MARQUAM.—It was written from Hot Springs.

The COURT.—Let the witness see the letter. (Letter handed to witness.)

A. I didn't know whether it was from Hot Springs or from Flat City.

Mr. PRATT.—Q. Where was it written from?

A. That must have been written from Hot Springs.

Mr. PRATT.—I offer this as an exhibit.

Mr. CLARK.—We object to it being filed as an exhibit.

The COURT.—It can be marked for identification, I suppose.

(Testimony of Edward Williams.)

Mr. PRATT.—There is a part of it in evidence.

Mr. McGOWAN.—He admits he made that statement. Why do you want it in evidence?

Mr. MARQUAM.—We have offered to introduce it in evidence, and the Court ruled it out, and we save an exception.

The COURT.—It may be marked for identification.

(Marked Defendant's Identification 5.) [119]

Defendant's Exhibit 5 [Letter, Dated January 20, 1912, Ed. J. Williams to "Dick"].

Defendant's Ident. "5."

Jan. 20th, 1912.

Friend Dick:

Your letter of Dec. 27th received a few days ago, and judging from the tone of it I know how you feel about the matter. I can't deny but what you are justified in looking at it as you do. As for myself I am placed in rather a delicate position and what the result will be I can't say. With reference to any trouble I haven't heard a thing since I came to Hot Springs. When I left Iditarod I saw Mr. Hurley and told him I was going to Fairbanks and that I would explain the situation to you. He also told me he would send a letter to Mr. Brunning.

On my arrival at Sullivan I wrote to the American bank in Iditarod and told them you had gone outside and that I couldn't do anything at present. I have no copy of the note or mortgage. The note was given the same time as the mortgage.

And as for the machinery, Tom Aitkin took it

(Testimony of Edward Williams.)

back. We did not have it all paid for. To be honest about it I am trying to forget it. I was almost crazy thinking of what a mess I had made of the whole transaction. After you had tryed to give me a start I have no excuse to offer and whatever the results will be I can't say.

I expect to hear from Iditarod any day and whatever the news is I will let you know.

I can't write to night Dick. Will write in a few days and try to give you full particulars.

Sincerely yours,

(ED. J. WILLIAMS.)

[Indorsed]: #1815. Third Trial. Deft's. Ident.
5. Mar. 25, 1914. P. R. W. [120]

Mr. PRATT.—Q. Mr. Williams, at the second trial, didn't you give testimony to this effect: I asked you the question (reads): "Didn't you get an intimation from some source that you were liable to be prosecuted criminally either for forgery or obtaining money under false pretenses? A. I figured that out myself without being enlightened. Q. You thought there was some chance of that. A. Yes, sir." Did you give that testimony?

Mr. CLARK.—We object as not contradicting him, and absolutely not cross-examination.

The COURT.—Objection sustained. (Defendant excepts.)

Mr. PRATT.—Q. Isn't it true that after you quit down there, and up to the time of the other two trials, you had some fears that you might be prosecuted criminally either for forgery or obtaining money un-

(Testimony of Edward Williams.)
der false pretenses?

Mr. McGOWAN.—I submit that is not cross-examination, irrelevant, incompetent and immaterial.

The COURT.—Objection sustained. (Deft. Richards excepts.)

Mr. PRATT.—Q. You remember of having a conversation with Dick Richards after you got back, when he got back in 1912? A. Yes, sir.

Q. I will ask you to state if it is not true that about September 3, 1912, in a conversation between yourself and Mr. Richards on Sullivan Creek in the Hot Springs country, if this didn't take place, and if this language was not used by yourself—(interrupted).

Mr. CLARK.—Without going into that we object as not cross-examination. We didn't go into any conversations had between him and Richards after he came back from the lower country. On the further ground that any conversations they had would not be binding upon the plaintiff in this action.

The COURT.—They wouldn't be binding on plaintiff, but I suppose [121] the purpose is to show contradictions. Objection overruled.

Mr. PRATT.—(Continuing.) Mr. Richards asked you if you would come to Fairbanks in case of getting an immediate hearing before the court. He asked you if you had represented him as your partner in the Iditarod, and you answered; "Yes, I did." Richards said: "On what understanding did you do that"? To which you answered: "I don't care to

(Testimony of Edward Williams.)

discuss it here, and I don't know how you feel about it, but I am sure I will not go to jail over it." Did you use that language in a conversation at that time and place?

Mr. CLARK.—We object as not cross-examination, and not in contradiction of anything testified to by this witness.

(Objection sustained, and deft. Richards excepts.)

Mr. PRATT.—Q. Did you have a conversation with Mr. Richards down there in the Hot Springs country about April 23, 1912, at Kelly & Anderson's roadhouse at Tofty, in which you said: Notary public Maltby, who made out the mortgage and lease to the American Bank, asked Williams where was his power of attorney, the paper, from Richards, so they could be recorded, and that you stated you didn't have any; and that the notary said that it was not legal, and proceeded with Mr. Williams to Mr. Hurley and told him the situation, whereupon Mr. Hurley answered: "Well, it is not business, but I will take a chance on you anyway."

Mr. CLARK.—We object as not contradicting anything that the witness testified to.

(Objection sustained. Deft. Richards excepts.)

Mr. PRATT.—Q. I will ask you to state if it is not true that on April 23, 1912, at Tofty, that you said to Mr. Richards that Mr. Hurley had promised that, when the bill of sale of lease was returned, signed and acknowledged, which was [122] done by Richards about April, 1911, all responsibilities attaching to Richards would be released, but, when

(Testimony of Edward Williams.)

the papers were procured, he refused to do it?

Mr. CLARK.—We object as not cross-examination.

Mr. MARQUAM.—Do you admit he testified in substance to that?

Mr. McGOWAN.—Ask him. It is immaterial anyway.

The COURT.—Objection sustained.

Mr. PRATT.—We except.

Q. Were you subpoenaed in this case?

Mr. McGOWAN.—We admit he was not.

Mr. MARQUAM.—We don't care for your admissions.

A. No, sir.

Mr. PRATT.—Q. How far did you travel to get here?

Mr. McGOWAN.—We admit that he came from Hot Springs.

Mr. MARQUAM.—We object to his admissions.

The COURT.—Counsel may make admissions. There is no use going over matters that are admitted.

Mr. MARQUAM.—We are entitled to ask a question and have an answer to it.

Mr. PRATT.—Q. How far did you travel to come up here?

Mr. McGOWAN.—We object to that as irrelevant, incompetent and immaterial, in view of the admissions we have made.

The COURT.—Objection sustained.

Mr. PRATT.—That is all.

Redirect Examination. [123]

Mr. McGOWAN.—Q. You testified that you de-

(Testimony of Edward Williams.)

livered some two or three letters to Mr. Adams sometime in September of 1911. Is that correct?

A. Yes, sir.

Q. Was that the first time that any officer of the plaintiff had ever been shown any one of those letters, or any letters?

Mr. MARQUAM.—We object as immaterial.

A. I can't recollect of ever showing any of them—

The COURT.—Objection overruled. (Deft. Richards excepts.)

A. I can't recollect of ever showing any of those letters to any of the bank officials previous to that time.

Mr. McGOWAN.—Q. That was after you had closed down on Flat Creek?

A. That I produced the letters?

Q. That you gave them to Adams? A. Yes, sir.

Q. When was that, what month?

A. The early part of September or the latter part of August.

Q. Of what year? A. 1911, I should think.

Q. Mr. Pratt also asked you about a telegram that was phoned to you at Hot Springs, and I understood you to say that the telegram was phoned over the phone to Richards & Williams. Is that correct?

A. I think that is the way, because the phone was called—it was registered as Richards & Williams.

Q. The phone was registered as Richards & Williams. A. Yes.

Q. Mr. Pratt stated something about your asking Mr. Richards to go and phone, because it was his

(Testimony of Edward Williams.)

phone and he could use it. Did you have the same right to use that phone that Richards did?

A. Yes, sir.

Q. On the index board of the telephone operator in Hot Springs how was your phone indexed?

A. Richards & Williams.

Q. And that was long before you left to go down to Iditarod [124] at all, was it not?

A. That was sometime before I went down—a short time.

Q. The bill of sale that you mentioned that you sent up for Mr. Richards to sign, that was sent in the letter of April 14th, was it not? In 1911?

A. I can't recollect the date of the letter.

Q. Defendant's Exhibit 2 (handing same to witness) on this trial, is that the letter in which you sent the bill of sale? A. Yes, sir.

Q. You testified on cross-examination, in answer to a question propounded by Mr. Pratt, that you thought the bill of sale was sent about the time that you gave the second note and the mortgage in February. That was a mistake, was it?

A. That was a mistake on my part in reference to the date.

Q. As a matter of fact, the bill of sale wasn't sent up until you wrote that letter in April.

A. No. But I may have had that bill of sale made out sometime before that.

Q. Did you receive that bill of sale from Mr. Richards prior to the 1st of July of that year?

A. No, sir.

(Testimony of Edward Williams.)

Q. In other words, you had made a contract, as you testified on cross-examination, to sell this property and the payment came due on the 1st of July.

A. Yes, sir.

Q. And one of the conditions of that transaction was that you must get a bill of sale from Richards.

A. Yes, sir.

Q. And on the 1st of July that bill of sale had not arrived. Is that right? A. Not at that time.

Q. Did you ever tell Mr. Hurley that you had sent a bill of sale [125] to Mr. Richards, and a letter to him in which you stated that he, Hurley, or the bank, would release Richards if he signed that bill of sale?

A. A letter to that effect to Mr. Richards?

Q. Yes.

A. I believe I mentioned in one of my letters here—I believe I mentioned that in one of my letters here.

Q. Did you ever tell Mr. Hurley about that down in the Iditarod, in February or March, or at any time? A. Not personally.

Q. Those were your own ideas?

A. I understood those were the conditions; that when I made out the bill of sale. Mr. Albright did Hurley's business.

Q. Those were the conditions?

A. Those were the conditions.

Q. That when the bill of sale came back you could make that arrangement.

A. That is what I thought were the conditions.

(Testimony of Edward Williams.)

Q. There was something said about the payment of a thousand dollars, and Mr. Pratt asked you about it? Was there any payment of \$1,000.00 on this note in question—the \$3,500.00 note that is in suit here?

A. No. I think that was the Boulton note.

Q. It has nothing to do with this suit here, or the note in suit?

A. No. It was on the mortgage for \$1500.

Q. When did you first realize that you had placed yourself in a delicate position with reference to the papers you signed in connection with this affair?

A. If I recollect right, after I had received Mr. Richards' first letter. [126]

Q. Then it was Mr. Richards who first called your attention to your position, in one of his letters?

A. He said I had done wrong. That is the way I felt about it.

Q. Has any member of the bank staff, or any officer of the bank, or any attorney of the bank, or anyone else connected with the bank, ever *suggest* that you need fear anything for anything you had done in connection with the bank? A. No, sir.

Q. Are you under any duress or force of any kind from anybody to put you on the witness-stand?

A. No, sir.

Q. In Defendant's Exhibit 2, which was a paper they read, and questioned you as to whether or not you had made certain statements, and this is one of them, "We will make money." Is that the way you wrote to Mr. Richards in that letter, "We will make money"? A. I think so.

(Testimony of Edward Williams.)

Mr. McGOWAN.—Q. Did you at any time after you signed the first note, the first note in controversy in this case, the note of October 5th, and within ninety days after that, write to Mr. Richards requesting him to send the money down to you to pay the note? (Apparently reading from something as follows:) A. “I wrote and told him what I had done exactly, and I told him also I would need some money.” Going on: “I notified Mr. Richards what I had done”—(interrupted).

Mr. MARQUAM.—We object as not the best evidence. If he wrote it, it is in his letters.

(Controversy between attorneys as to demand for, and the existence of, and the possession of, such a letter.) [127]

(Objection overruled, and deft. Richards excepts.)

Mr. McGOWAN.—Q. Did you so write?

A. I don't say that I did exactly.

Q. What did you say about the payment of the money?

Mr. PRATT.—We object to that, as the letters are the best evidence.

The COURT.—You were called upon to produce the letter, and you have not done so.

Mr. PRATT.—I never heard about any such letter as that.

The COURT.—Objection overruled. (Deft. Richards excepts.)

The COURT.—That is what the question refers to; whether there is such a letter as that.

Mr. PRATT.—No. He is asking him to state the

(Testimony of Edward Williams.)

contents of an imaginary letter that he don't even say is in existence.

The COURT.—Answer the question. (Deft. Richards excepts.)

A. I just wrote to tell Mr. Richards the conditions of my transactions, and also—it was read in court this afternoon—about me asking for money, but I didn't say for notes. I think the letter was read in court to-day.

The COURT.—Q. That is the letter you refer to?

A. I don't know whether it is the letter that Mr. McGowan is asking me about or not.

Mr. McGOWAN.—Q. Is that the only one you wrote advising Mr. Richards of the amount due?

A. I needed money, and he criticized me—

Mr. McGOWAN.—Is that the only letter you wrote—the one here—referring to money matters?

A. Yes, sir.

Q. Were you at any time in the year 1910 or 1911, or both, employed in any capacity by the American Bank of Alaska, or by Mr. Hurley, as agent, or anything else? A. No, sir. [128]

Q. Did you ever at any time during those two years act on behalf of Mr. Hurley, or the bank, in any capacity, or for them? A. No, sir.

Mr. McGOWAN.—That is all.

Recross-examination.

(By Mr. PRATT.)

Q. I show you a contract. See if those signatures are genuine, yours, McLellan's and McKenzie's.

A. Yes, sir.

(Testimony of Edward Williams.)

Q. It is a copy of the contract you entered into on Flat Creek? A. Yes, sir.

Mr. PRATT.—I offer this in evidence.

Mr. McGOWAN.—We object, as irrelevant, incompetent and immaterial, not proper recross-examination, and a part of their case.

The COURT.—I do not think it is cross-examination on the last examination of the witness.

Mr. PRATT.—I don't suppose it is.

The COURT.—What is the purpose?

Mr. PRATT.—The purpose is to show that he took in some men at the time he gave this note that is in suit, sold them a half interest, took them in partnership, gave them a contract to mine there with him; that that was at the same time that he arranged with the bank to relieve Mr. Richards from even the appearance of liability by getting a formal conveyance from him.

Mr. CLARK.—That is immaterial.

The COURT.—Objection sustained.

Mr. PRATT.—It happened to be dated February 24th. He said he made this contract with them on February 20th. He sold McLellan & McKenzie this half interest on the 20th of February, and the writing is the 24th.

The COURT.—Objection sustained. [129]

Mr. PRATT.—It was allowed in evidence before as Defendant's Exhibit "A." This says (referring to paper) "for identification."

Mr. McGOWAN.—That is all. It was never put in evidence.

(Testimony of Edward Williams.)

The COURT.—I do not know what difference it makes whether it has been or not.

Mr. PRATT.—Q. You say you got that first letter from Richards dated December 8, 1910—you must have gotten that sometime in January, I suppose, didn't you? A. I can't recollect the dates.

Q. Anyhow, when you did get it, you took it from that that Richards was dissatisfied with you for using his name—signing his name there?

Mr. McGOWAN.—We object, as that has been fully covered.

The COURT.—Objection sustained.

Mr. MARQUAM.—We are directing this to the questions asked by McGowan, "When did you first feel that you were in a delicate position, or liable to get yourself in trouble," and he said, "After I got Mr. Richards' first letter." We want him to point out what part of that letter made him feel that he was liable to be prosecuted, and to show that that statement is untruthful.

The COURT.—Objection overruled, then, but it seems to me it is the whole letter.

Mr. MARQUAM.—We object to the Court passing upon that letter in the presence of the jury; that is for the jury to do.

The COURT.—The Court is passing on the admissibility of it.

Mr. PRATT.—Q. What part of that letter?

A. What letter do you refer to?

Q. December 8, 1910, signed by Richards, which you claim is the first letter you got. [130]

(Testimony of Edward Williams.)

A. It might be a mistake on my part. It was the first letter after I had notified Richards of my transactions. But I think I got the first letter, and it was brought to me. But it was the first letter after I had notified him of my transactions in the Iditarod, and what I had done.

Q. The first letter you received from him was the one dated September 21st?

Mr. CLARK.—That was the one that followed him down. December 8th is the one.

Mr. MARQUAM.—The first letter is September 21st.

Mr. MCGOWAN.—He said it was the first letter after he had advised Richards.

Mr. PRATT.—Q. What letter are you talking about that you got from Richards—which one?

A. The first letter after I notified him of my transactions.

Q. That is the one dated December 8th?

A. I don't know the date. I have not seen those letters for a long time.

Q. Didn't you get one dated just about a week after that?

Mr. MCGOWAN.—That is not cross-examination.

The COURT.—That has been gone over enough.

Mr. PRATT.—Q. Didn't you get that before you got the one dated December 8th?

A. I can't recollect.

Q. Wasn't that the one, the second letter in date that he wrote you, that you got first? Wasn't that the way? Didn't you get that first, and wasn't that

(Testimony of Edward Williams.)

the one that made you think—made you apprehensive that Richards might have you prosecuted for forgery and obtaining money under false pretenses?

A. The letter is there.

Q. What?

A. It is the first letter after the transaction. [131]

Mr. McGOWAN.—Q. Is it in court here to-day? Has it been read?

A. I would like to hear it read myself.

Q. What is your last answer?

A. I think it is in court to-day.

Mr. PRATT.—Q. Here is a copy of it. Can you pick out in there the part that caused you to apprehend that Dick Richards was going to prosecute you criminally? (Hands witness paper.)

Mr. McGOWAN.—We object as immaterial and not cross-examination.

The COURT.—Objection sustained. (Argument.)

Mr. PRATT.—Q. Point out the part of that letter that caused you to say that you felt in a delicate position—felt apprehensive?

Mr. McGOWAN.—We object to the word “apprehensive”; that was not the wording used.

The COURT.—Objection sustained.

Mr. PRATT.—Q. What caused you to say that you felt in a delicate position?

A. For the business that I transacted down there and assuming Mr. Richards as my partner.

Mr. MARQUAM.—We object to that as not responsive.

Q. What part of that letter?

(Testimony of Edward Williams.)

A. And in reading this letter, after I had notified him exactly of what I had done, if any party had received this letter they would have judged from this letter that he was not satisfied with my transactions; and I didn't have to ask Richards about placing myself in a delicate position, because I could realize it myself.

Mr. MARQUAM.—Q. You mean, then, it is the whole letter and not any special part of it?

A. Not the whole letter.

Q. Is that the letter you hold in your hand now?
[132] A. Yes, sir.

Q. What date is that? A. December 8th.

Mr. PRATT.—Q. Did you ever have any apprehension from the bank or anybody connected with the bank?

Mr. McGOWAN.—They covered that fully on cross-examination.

The COURT.—Yes. You (to Mr. Pratt) have been over that matter.

Mr. PRATT.—That is all.

Mr. McGOWAN.—That is all.

(Here the trial is continued until 7:30 this evening, and the jury are placed in the custody of the bailiffs until the trial is resumed.)

March 25, 1914, 7:30 P. M.

Jury present. Trial resumed.

Mr. CLARK.—At this time I desire to introduce in evidence the deposition of Joseph H. Egler, taken by stipulation in this case, before E. T. Wolcott, on

(Deposition of Joseph H. Egler.)

January 13, 1914. The stipulation is attached to the deposition. (Reads deposition.)

[Deposition of Joseph H. Egler.]

“JOSEPH H. EGLER, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Your name is Joseph H. Egler? A. Yes, sir.

Q. Where do you reside?

A. Tofty, Hot Springs District.

Q. Are you acquainted with Edward Williams?

A. Yes, sir.

Q. Are you acquainted with Edwin Richards?

A. Yes, sir.

Q. Do you remember when Edward Williams went to the Iditarod?

A. Yes, sir. I remember about the time. It was in the fall of the year.

Q. Of what year?

A. As far as the year was concerned, it was about the time that that stampede was down there to the Iditarod. I don't know exactly what date it was.

[133]

Q. That was in 1910, was it not?

A. Well, I think so, to the best of my knowledge.

Q. Or was it 1911?

A. It was during the excitement down there, I know. When he went down there was in the fall of the year. He went down in a small boat—at least, I was told he went in a small boat.

Mr. PRATT.—I ask the witness to remember that

(Deposition of Joseph H. Egler.)

he is to testify only to what he himself knows.

Mr. CLARK.—Just what you know.

A. I don't know that he went to Iditarod at all, but I was told he went to Iditarod; in fact I seen him leave Sullivan intending to go to the Iditarod.

Q. Did he tell you he was going to the Iditarod?

A. Yes.

Q. Did you see Edwin Richards the following spring after Mr. Williams had left Sullivan Creek telling you he was going to the Iditarod?

A. Yes. I did.

Q. Where was it?

A. It was in the Central Roadhouse, Kelly & Anderson's.

Q. Where is that located?

A. On Tofty. It is called the Postoffice at Tofty,—the town of Tofty.

Q. Did you have any conversation about any interest that Mr. Richards claimed in the Iditarod?"

That question is objected to and withdrawn.
(Reads:)

"Q. Did you, in that conversation with Mr. Richards, discuss with him anything about purchasing any interest that he had—any mining interests?

Mr. PRATT.—I object as leading, immaterial and irrelevant."

Mr. PRATT.—I insist upon that objection.

The COURT.—Objection overruled. (Deft. Richards excepts.)

Mr. CLARK.—(Reads:)

"A. Well, the conversation that I had with Mr.

(Deposition of Joseph H. Egler.)

Richards was, he wanted to know if I didn't want to take that proposition off his hands.

Q. What proposition do you mean by, 'that proposition'?

A. The proposition that was—(interrupted).

Mr. PRATT.—I insist that the witness should state the conversation or the substance of it as near as he can remember.

Q. State the conversation. [134]

A. We were talking about mining matters. He was mining at that time on Cache Creek, and I was mining on Tofty. And he wanted to know if I didn't want to take up that proposition in the Iditarod. I told him at the time I didn't know. I said, 'What will it cost?' He says, 'I am in about six thousand dollars.' I told him I couldn't handle it, because I had spread out too much myself. And that was about all the conversation in reference to that that I can recollect of at the present time.

Q. You say the conversation took place in the road-house.

A. In Kelly and Anderson's Central Roadhouse.

Q. Do you know who was present at that time?

A. There was a lot of men present, but nobody heard our conversation, because we were talking to ourselves. We were in the dining-room at the time, and we were in the bar. We had a glass of beer and a cigar. We were in the postoffice. The postoffice and dining-room is all in one room.

Q. Who first opened the conversation?

A. Well, I was talking to him about what he heard

(Deposition of Joseph H. Egler.)

from the Iditarod. And he said it looked pretty good down there. And I think I asked him something about if Williams got hold of anything. He said, 'He has got hold of a lay down there.' I didn't know where the lay was, or anything about it, at the time, and he told me, but I don't know now, but I think it was on Flat Creek, if I recollect right.

Q. Then, what did he say?

A. He wanted to know if I didn't want to take that proposition off his hands.

Q. Did he mention Williams' name?

A. He mentioned Williams' name. But it seems as though there were some other partners connected with Williams. I don't really recollect what he said about Williams' partners, or anything, that is, who was connected with Williams.

Q. When were you first asked about whether you knew anything about this matter? A. This now?

Q. Yes.

A. To-day was the only time, or yesterday was the first time I was asked by anybody, outside of Jake Howell asked me if I knew anything, and I said I knew of something, but never was called on—(interrupted).

Q. Who first spoke to you about that?

A. Mr. Hurley in the bank.

Q. Then, who did you see next?

A. I was over to see you and McGowan. In fact, McGowan and you.

Q. Now, is that the only conversation that you had with Mr. Richards about this matter? [135]

(Deposition of Joseph H. Egler.)

A. Well, yes, I think it is. Mr. Richards and I are partners in other mining properties. This is the matter just as I understood the case at the time, and understand to-day. We are partners in some ground on Cache Creek. We are partners and have always been good friends. But this is a matter of just the truth, and I don't want you to misunderstand me. I want to state it to you just as I understood it at that time.

Q. Can you fix anywhere near what date or what time it was that this conversation took place?

A. I think it was along in the spring before sluicing; sometime, I think, before sluicing started.

Q. If Mr. Williams went down to the Iditarod in 1911, would that be in the spring of 1912?

A. Yes. It would be.

Q. You think it was before sluicing commenced?

A. I am quite sure it was.

Q. You are going back to Hot Springs to-morrow, are you?

A. Yes. I am all ready to go to-morrow. I have got all my stuff fixed up to-day to go home.

Mr. CLARK.—You may cross-examine.

Cross-examination.

(By Mr. PRATT.)

Q. This conversation happened in 1912, in the spring time.

A. Yes, I think it did, to the best of my recollection, Judge. Just the following year after Williams went down to the Iditarod.

Q. Did that happen before or after the sluicing

(Deposition of Joseph H. Egler.)

commenced, do you think?

A. What I mean to say, it would be before sluicing. I don't think that Williams went down, as I understood—(interrupted).

Q. This conversation; did that occur before the sluicing season commenced, or after?

A. Yes, I am quite sure it did.

Q. Before? A. Yes, I am quite sure it did.

Q. How much before?

A. I don't know as to that. It might have been six weeks.

Q. That would be in February or March?

A. Well, sluicing, as a general rule—I forget. I know the first of May—I couldn't give you the exact time in the spring of the year, but I know it was towards spring of the year.

Q. Six weeks before the first of May, would bring it back to about the middle of March, wouldn't it?

A. I think it was sometime in March, to the best of my recollection, Judge. [136]

Q. Didn't Mr. Richards tell you that Williams had some partners in a lay down there, and they were jangling and not getting along very well?

A. I don't know as he did.

Q. Didn't he tell you something to that effect?

A. I don't know as he did.

Q. Didn't he tell you something about Williams having some partners down there?

A. Well, he told me Williams had some partners.

Q. Now, isn't it true that he also told you that he was not getting along very friendly with them?

(Deposition of Joseph H. Egler.)

A. He said he didn't know how they were going to make out.

Q. And didn't he tell you that it was very likely, if you wanted to, that you could buy Williams out, or could buy the other partners out?

A. No. Here is what he told me: He said he was in about six thousand dollars.

Q. Nobody heard that conversation.

A. No. Nobody heard it but he and I.

Q. Were you in partnership with him then?

A. Yes. We owned some ground together on Cache Creek, and we still own it to-day as far as I know. That is on the Hillside and the Alabama.

Q. Your feelings toward him have not been very friendly of late? A. Richards?

Q. Richards, yes.

A. Certainly it has been friendly. We have always been neighborly, and are to-day, as far as I know.

Q. Has he been friendly toward you lately?

A. I don't know. He has not been any different.

Q. Where do you do your banking?

A. Well, when I have money I have been banking in both banks up until this last year. I usually do my banking, in fact, in every bank in town.

Q. Have you got an account in the American Bank?

A. I have an account with the American Bank, and I have a little account with the other bank.

Q. Are you indebted to the American Bank of Alaska in any sum?

A. Am I? Yes. I am indebted a few dollars.

(Deposition of Joseph H. Egler.)

Q. How much are you indebted to them now?

A. You want me to answer that question?

Q. Yes. A. Is that reasonable?

Mr. CLARK.—It is personal privilege. [137]

A. Then, I wouldn't answer that, unless I have to answer it.

Mr. PRATT.—I consider that you do.

Mr. CLARK.—You have admitted that you are indebted, and you don't have to answer how much.

A. That sounds reasonable. If I have to answer it, I will answer it; if I don't have to, I won't answer it.

Mr. PRATT.—I say, if you were in court, the Court would require you to answer it.

Mr. CLARK.—And I say, you wouldn't. But you can answer it if you wish to.

A. I owe him \$400.00.

Mr. PRATT.—Q. Did you get that since you were in town this time?

A. I got that since I have been in town.

Q. And the time you were getting that, you told him about this testimony that you knew of.

A. At that time I was getting that?

Q. Yes.

A. No. Not at the time I was getting that.

Q. You told him before?

A. No. I told him after.

Q. Where were you when this case was on trial—(interrupted).

A. I will tell you the conversation, if that will do you any good, that took place.

(Deposition of Joseph H. Egler.)

Q. Where were you when this case was on trial in February or March of last year?

A. I was down to Hot Springs.

Q. You knew the case was coming on for trial, didn't you? A. Now again?

Q. No. The first time.

A. I know he had two trials.

Q. You knew the case was to be tried, and you knew witnesses were coming up last spring to try that case?

A. I know the case has been tried; that he had two cases—trials.

Q. All you know about that is somebody told you so—that they had two trials.

A. I saw in the papers that they had two trials.

Q. Now, while those trials were going on, you were down at Tofty? A. I was. Yes.

Q. Did you ever tell anybody then what you knew about this? A. Who? Me? [138]

Q. Yes. A. I told Howell.

Q. At that time? A. At that time. Yes.

Q. Did you tell him at that time?

A. Yes. I told him at that time—over a year ago.

Q. I thought you said in your direct examination that you hadn't told anybody at all until here recently, and that Howell was the one you told, and then you told Hurley.

A. I don't think I said that.

Q. You say you told Howell about this a year ago?

A. I did.

Q. Where were you when that happened?

(Deposition of Joseph H. Egler.)

A. Down around Sullivan.

Q. A year ago. That would be in January of 1913 that you told Jake Howell.

A. Over a year ago, I said.

Q. Then that would be back—(interrupted).

A. That was before you ever had a case.

Q. That would be back in 1912 that you told Sylvester Howell what you knew about this very thing.

A. That was before there ever was a case.

Q. Before any case was ever started?

A. Before any case was started here. Yes, sir.

Q. Are you mining down there now?

A. Yes, sir; and have been ever since I left here.

Q. I presume you got this money to assist you in your mining operations, here from the bank.

A. I got this money to use.

Q. In your mining operations—in your business as a miner? A. I wouldn't answer that question.

Mr. PRATT.—You don't need to, if you don't want to. That is all.

Redirect Examination.

(By Mr. CLARK.)

Q. Did you tell Mr. Hurley about these facts, or did he ask you?

Mr. PRATT.—I object as not proper redirect examination."

Mr. PRATT.—I insist upon that objection.

The COURT.—Objection overruled. (Deft. Richards excepts.)

Mr. CLARK.—(Continues reading:)

(Deposition of Joseph H. Egler.)

“A. I would like to explain it to you, so you will understand. [139]

Mr. CLARK.—Put your explanation in, then.

A. When I got ready to leave, I said to Mr. Hurley, ‘If there is anything I can do for you down there, don’t forget to notify me.’ He asked me if I knew anything about this Richards case, or what I knew about it. Well, then, I told him I didn’t know just—I stayed here two nights—(interrupted).”

Mr. CLARK.—(Continues reading:)

“Q. After you had your talk with him, you came over to see us? A. I did.

Q. Did you give him that information because he had loaned you money?

A. I should say not. It is a business proposition to borrow money from a bank and pay interest on it.

Mr. CLARK.—That is all.

Recross-examination.

(By Mr. PRATT.)

Q. What kind of security did you give him?

A. I gave him a note.

Q. Any chattel mortgage, or anything?

A. No mortgage, not a thing. Just a note.

Mr. PRATT.—That is all.

Mr. CLARK.—That is all.” [140]

[**Testimony of C. J. Hurley, for Plaintiff.**]

C. J. HURLEY, a witness for plaintiff, after being sworn, testified as follows, to wit:

Direct Examination.

Mr. CLARK.—Q. Your name is C. J. Hurley.

A. Yes, sir.

(Testimony of C. J. Hurley.)

Q. You are the president of the American Bank of Alaska. A. Yes, sir.

Q. Are you acquainted with Edward Williams?

A. Yes, sir.

Q. Do you know Edwin Richards? A. Yes, sir.

Q. Where were you in the fall of the year 1910?

A. Iditarod.

Q. Did you see Mr. Williams down in the Iditarod during that fall? A. Yes, sir.

Q. State the circumstances under which you first saw him, that is, in connection with any business transaction that he may have had with yourself or the bank.

A. In September of 1910 he was brought into the bank and introduced to me by Thomas Morgan, of Morgan & Litsey, with a statement that he had known him—(interrupted).

Mr. PRATT.—We object to that statement.

Mr. CLARK.—Q. You need not state what he told you about him. He was introduced by him at that time.

A. He was introduced to me, and Mr. Morgan said he would probably want to transact some business with me.

Q. Did you have any conversation with Mr. Williams at that time?

A. I don't remember that I did right at that time.

Q. Did you have any at any time after that, shortly after that?

A. Yes, sir. He opened up a bank account with us.

(Testimony of C. J. Hurley.)

Q. State the circumstances under which that bank account was opened, and detail as near as you can remember the conversation that you had with him.
[141]

A. Mr. Richards stated that the money he had deposited was Richards' money.

Mr. PRATT.—We object to that, and move that it be stricken out, as incompetent and irrelevant testimony, mere hearsay. The declaration of Williams down there in the absence of Richards; any kind of a declaration, direct or indirect, that he was connected with Richards in business to the extent of being a partner of any kind is not legitimate testimony until there is a *prima facie* showing of some kind of a partnership. That is the purpose of this; to get a naked declaration from Williams, and rest upon that as proof that he and Richards were partners.

The COURT.—For that purpose it would not be competent. I understand this is part of the transaction down there. It is not proof of the partnership itself.

Mr. PRATT.—There is nothing upon which it can be predicated or said that the plaintiff has made a *prima facie* case; there is not any testimony prior to that. Declarations of partners, after there is proof of a partnership, are admissions against interest. If there had been a *prima facie* showing of a partnership, the testimony now offered here would be legitimate.

(Testimony of C. J. Hurley.)

The COURT.—The objection is overruled.

Mr. PRATT.—We except.

Mr. CLARK.—Q. State what the conversation was.

A. He stated that the money he had to open up the account with was given to him by Mr. Richards, and was Mr. Richards' money; that he had sent him down there to look up some proposition to see if he could get into something; they were partners together.

Mr. PRATT.—I move to strike that out as mere hearsay, in the absence [142] of Mr. Richards, and he is not bound by it.

The COURT.—He is not bound by that.

Mr. PRATT.—Then it ought to be stricken out.

The COURT.—I think he has a right to tell the transaction there. How the jury will consider it, depends on the case made before that, or as it shall be connected hereafter. As it is, it is not direct evidence of a partnership.

Mr. PRATT.—I move to strike out that part of his answer which said that Williams told him that Richards had given him this money and sent him down there to make an investment—something to that effect—as hearsay.

The COURT.—That may be stricken out.

Mr. CLARK.—Q. What, if anything, did he say as to how he was going to open the account?

Mr. PRATT.—We object as leading and suggestive.

(Objection overruled; deft. Richards excepts.)

(Testimony of C. J. Hurley.)

A. After making the statement, he asked my advice how to transact the business, the partnership affairs.

Mr. CLARK.—What did you tell him?

A. I advised him to open the account in the name of Richards & Williams.

Q. Did you give him any reason?

A. I told him if anything happened to him, Richards would have no trouble in proving his claim to the money—his interest in it; and, furthermore, that if he transacted the business in that way, he would have his checks as vouchers returned to him from the bank to account for all the money that Richards furnished him with, in the absence of keeping books. At the same time they might come in very convenient to him in making an accounting.

Q. Do you know how much he deposited?

A. Twenty-one hundred dollars. [143]

Q. Did you at any time after that have any further business dealings with him in connection with making a loan? A. Yes, sir.

Q. State the circumstances under which that came about.

A. He made application for a loan of \$3,500.00 with the understanding that he and Richards were partners in that down there.

Mr. PRATT.—We object to that, and move that it be stricken out, about the understanding that these two men were partners.

The COURT.—I think that matter can be governed by an instruction to the jury as to the effect of such

(Testimony of C. J. Hurley.)

evidence, and as part of the transaction between these two men.

Mr. PRATT.—It is not legitimate evidence. It should not go in. It might mislead some of them. They might think that was significant.

The COURT.—This witness has a right to testify concerning the transaction between him and Williams.

Mr. PRATT.—But he has not got a right to testify that he did a certain thing upon his understanding; just a naked declaration like that, upon his understanding that these two men were partners. He is supposed to give testimony as to facts.

Mr. CLARK.—He has testified that he told him they were partners.

Mr. PRATT.—That was merely his understanding.

The COURT.—I do not see how it can be separated very well. He may go ahead.

Mr. PRATT.—We except.

Mr. CLARK.—Q. Did you make a loan to him?

A. Yes, sir. I made a loan of \$3,500.00 in the name of Richards & Williams. Before making the loan, I further consulted Tom Morgan on the matter, and Williams said he had known—

Mr. PRATT.—We object to what Williams said.
[144]

Mr. CLARK.—Q. Without stating what Williams said, state whether or not you made any investigation as to the standing of Mr. Williams or Mr. Richards.

(Testimony of C. J. Hurley.)

A. Yes, sir, as to Mr. Williams. I knew Mr. Richards' standing.

Q. How long have you known Mr. Richards?

A. I had known of Mr. Richards ever since I have been in this camp.

Q. Did you know what his financial standing was at that time, in October, 1910?

A. Yes, sir, in a general way.

Q. How long after Williams made application to you for a loan did you grant the loan?

A. I couldn't say whether it was the same day, or in the matter of a day or two.

Q. When you made the loan, did you take a note for it? A. Yes, sir.

Q. I show you this instrument, marked Plaintiff's Exhibit 3 at the third trial, and ask you what that is.

A. That is the note I took at the time I made the loan.

Q. Mr. Hurley, that note states it is due in ninety days. State the reason for making it mature in ninety days.

Mr. PRATT.—We object as irrelevant, incompetent and immaterial, having nothing to do with the issues in this case.

(Argument. Objection overruled. Deft. Richards excepts.)

A. It was made for ninety days to give Williams time to write up to Richards for the money. Mr. Williams stated that Mr. Richards told him—(interrupted).

(Testimony of C. J. Hurley.)

Mr. PRATT.—We object to what Williams stated.

(Objection overruled, and deft. Richards excepts.)

A. Mr. Williams represented that when he left Hot Springs and Richards gave him this \$2,500—or whatever amount it was— [145] that if he got into something that required more money, to let him know and he would send it down to him. That was the reason the note was made for ninety days.

Mr. PRATT.—I move to strike that out.

(Motion denied, and deft. Richards excepts.)

Mr. CLARK.—Q. Was the note paid in ninety days? A. No, sir.

Q. What, if anything, happened between you and Williams about the time of the maturity of the note?

A. About the time of the maturity of the note, or it may have been several weeks after the maturity,— Mr. Williams was out on Flat Creek all the time,— and the first time I saw him in town I called his attention to the note being due—past due, and Williams said he had not heard from Mr. Richards yet, and was unable to take it up.

Q. Did you have any further conversation with him at any later date concerning it?

A. Yes, sir. And the next time I saw him I again called his attention to it being much past due. He said he had heard from Richards, and Richards could not spare the money at that time; that he was in poor health, and that he was making arrangements to operate on a large scale down at the Hot Springs. Also, I believe, he stated that Richards said he couldn't come down there himself.

(Testimony of C. J. Hurley.)

Q. Did you have any further negotiations about the 24th of February in regard to the matter, in 1911?

A. I took a renewal note of this note of \$3,500 on February 24th, 1911.

Q. Mr. Hurley, I call your attention to this note dated October 6, 1910, marked "Paid. February 25." Was there any money paid at the time that stamp was put on there?

A. No, sir, it was paid by this renewal note. There was no cash [146] transaction in connection with it.

Q. I show you this instrument—(interrupted).

A. The "Paid" stamp was put on the old note just merely to cancel it, so that we wouldn't be holding two notes.

Q. Did you surrender the old note at the time?

A. I think I did.

Q. I show you Plaintiff's Exhibit "H," Third Trial, and ask you if that is the note you have referred to as the renewal note. A. Yes, sir.

Q. What, if anything, was done at the time this renewal note was given, concerning the interest due on the original note? A. The interest was paid.

Q. Did you, at the time of taking this renewal note, obtain any security?

A. Yes, sir. I took a mortgage upon their interest in the lay on Flat Creek. That was the only available security that was there.

Q. Did you know in whose name the lay stood—the interest in the lay stood—the one that was pur-

(Testimony of C. J. Hurley.)
chased by Mr. Williams?

A. I can't say that I knew until this came up. Mr. Williams executed the mortgage in the name of Richards & Williams, and I naturally supposed it stood of record in their name.

Q. You didn't make any individual investigation?

A. No, I didn't. I think Major Albrecht did that.

Q. Major Albrecht at the time was looking after the business of the bank? A. Yes.

Q. At the time this note was signed and this mortgage executed, did you have any conversation with Mr. Williams concerning a power of attorney,—his being attorney in fact for Mr. Richards? [147]

A. At the time I took that note and mortgage I took Mr. Williams over to Major Albrecht's office, filled out the note myself, all but that date there (showing) and that is in Major Albrecht's handwriting.

Q. You refer to Plaintiff's Exhibit "H," Third Trial? A. That is the February 24th note?

Q. Yes, sir.

A. I took Mr. Williams over to Major Albrecht's office and told him I wanted him to draw up a mortgage, and Mr. Williams would execute it, upon the interest out on Flat Creek. And I went back to the bank, and after Major Albrecht—the same day towards evening, I think it was the same day, possibly the next day, Mr. Williams came into the bank and told me that the mortgage had been drawn up and Major Albrecht requested him to sign individually and for Richards by himself as attorney in fact. I never in-

(Testimony of C. J. Hurley.)

structed Mr. Albrecht to draw it in that way, and I told Williams I had not and I didn't understand why he drew it that way. It seemed unbusinesslike to me, and I didn't want him to take any chances signing any mortgage or executing it in the name of Richards as attorney in fact without a power of attorney, and I advised him to go to his attorney and ask him upon that point before he signed up the mortgage.

Q. To go to who?

A. To go to his attorney. I didn't mention any name.

Q. Did he go away from your office?

A. Yes, he did.

Q. Did he come back afterwards?

A. I don't recollect. He came back to me after that. I understood afterwards from Williams that he went to Mr. Maltby.

Q. Maltby was a practicing attorney at Iditarod?
[148]

A. Yes, sir.

Q. Did he sign the mortgage after that?

A. Yes. I didn't go to Maltby with Williams, but he left the bank to go and see Mr. Maltby sometime before he executed the mortgage. Maltby was commissioner at that time.

Q. After the mortgage was executed, did you have any further conversation with Mr. Williams concerning this matter, that is, anywhere within a short time after the mortgage was executed?

A. Not that I remember of. No, sir.

(Testimony of C. J. Hurley.)

Q. Has any part of this note ever been paid?

A. No, sir.

Q. Have you figured up the interest that is due on the note? A. Yes, sir.

Q. How much is it?

A. Thirty-seven months, \$1295. That is up to March 24th, this month.

Q. That would be up to yesterday. A. Yes.

Q. During the fall of 1910, had the wireless been erected in Iditarod? A. No, sir.

Q. Telegrams that *were be* sent from Iditarod, where was the nearest place to which they were taken for transmission?

A. To Nulato or Kaltag. Sometimes they were taken to Nulato and sometimes to Kaltag. It is not very far by water between the two points. That is, they were transmitted by mail from Iditarod to Kaltag or Nulato, and the reply came back in the same way.

Q. During that fall what, if anything, happened to the lay that was covered by the mortgage that you held? A. In the fall of 1910?

Q. Yes, sir. A. Nothing that I know of.

Q. Or in the summer or fall of 1911. [149]

A. They closed it down in the fall of 1911, along in the early part of August or first of September.

Q. What, if anything, did you do with the note—this note of February 24th, 1911—after the lay was closed down?

A. I sent it up here to this bank for collection.

Q. From whom?

(Testimony of C. J. Hurley.)

A. From the American Bank of Iditarod to the American Bank of Fairbanks, to Mr. Bruning, the cashier.

Q. Are you acquainted with the signature of Mr. Bruning? A. Yes, sir.

Q. Mr. Bruning is your cashier? A. Yes, sir.

Q. Is that your letter-head? (Hands paper to witness.)

A. That is our letter-head, and his signature.

Mr. CLARK.—We desire to introduce this in evidence.

Mr. PRATT.—We object to this paper upon the ground that it is incompetent, irrelevant and immaterial, for the reason that should the Court permit it in evidence it would be upon a theory that is not set forth in the complaint either directly or indirectly; in other words, it would be evidence upon an entirely different cause of action than the one set up here. (Argument.)

The COURT.—What is the letter about?

Mr. McGOWAN.—We desire to show a demand for the money. This is a letter we asked them for, and they gave it to us.

The COURT.—Was any demand necessary?

Mr. McGOWAN.—No, sir.

Mr. PRATT.—It was a letter addressed to us. We got the letter. (Argument.) It is to show an estoppel.

The COURT.—I don't understand that to be the purpose, but to show that they made a demand, which you say is not disputed. (Argument.) [150]

(Testimony of C. J. Hurley.)

Mr. CLARK.—We will pass that.

Q. Mr. Hurley, did you ever receive any communication from Mr. Richards prior to the time the renewal note was sent to Fairbanks to be collected? Did you ever receive any communication of any description from Mr. Richards?

A. To myself or to the bank?

Q. Yes, sir. A. No, sir.

Mr. PRATT.—Between what dates?

Mr. CLARK.—Between the 6th day of October, 1910, and the 6th day of October, 1911, did you receive any communication, between those dates, from Mr. Richards? A. No, sir.

Q. Did you ever, during the year 1910 or 1911, authorize or delegate Mr. Williams as your agent or representative to write to Mr. Richards, or to communicate any fact or thing to Mr. Richards?

A. No, sir. I never even suggested it to him.

Q. Or as the agent of the bank, or did the bank ever create him their agent for any purpose?

A. No, sir.

Q. Did you have any other dealings with him in connection with any transaction, that is, during the year 1910 and up to about the month of September or October, 1911, connected with any other transaction than this particular one we have been discussing? A. No, sir.

Mr. CLARK.—That is all. Your witness.

Cross-examination.

(By Mr. PRATT.)

Q. You got a letter after that one.

(Testimony of C. J. Hurley.)

Mr. McGOWAN.—We object to that. He objected to that one, so the reply to it is out of order.

(Objection overruled.) [151]

Mr. PRATT.—I want that letter of January 2, 1912. It was in evidence in the other case.

Q. Now, Mr. Hurley, you say you didn't get any letter from him between the 6th of November, 1910, and the 6th of November, 1911. I will ask you if you got that. (Handing paper to witness.)

A. 6th of October, Judge.

Q. Or October, rather. Whose handwriting is that? Is that Mr. Richards' letter to the bank?

A. It is signed by Richards.

Q. Dated January 2, 1912? A. Yes, sir.

Q. That was with reference to this last note, wasn't it?

Mr. CLARK.—We object as not the best evidence. The letter is the best evidence, and the one to which it is a reply.

Mr. PRATT.—I want to read this to the jury.

Mr. McGOWAN.—We object to it without the letter which it is in reply to.

The COURT.—Objection sustained.

Mr. PRATT.—We except.

Q. Mr. Hurley, you knew Dick Richards here when he was on Dome Creek, didn't you?

A. I don't think I knew him personally. I knew of him.

Q. You knew of his financial standing?

A. Yes, and I knew him by sight.

Q. It was pretty good? A. Yes, sir.

(Testimony of C. J. Hurley.)

Q. You knew him in the Hot Springs country?

A. Yes.

Q. You knew he was a man of means and employed people, and responded to his obligations, didn't you?

A. Yes, sir.

Q. Did you know this man Williams when he showed up there in your bank? A. No, sir.

Q. You never heard of him before?

A. I may have heard of him, but I didn't know him.

Q. You wouldn't loan him any money?

A. No, sir. [152]

Q. He told you he wanted to borrow money to buy an interest in the Boulton lay on Flat Creek, didn't he? A. Yes, sir.

Q. He told you how much he wanted?

A. Yes, sir.

Q. He wanted to borrow it himself, didn't he?

A. No, sir.

Q. Didn't he suggest that at first? A. No, sir.

Q. You say that he told you that Dick Richards was his partner? A. Yes, sir.

Q. What kind of a partner did he say?

A. He said he was his partner. He had sent him down there to become interested in mining, and Dick Richards was his partner.

Q. He didn't say whether he was a general partner, or side partner, or mining partner, or what sort of a partner.

A. He said he sent him down there to become interested in mining interests. That would make him a mining partner.

(Testimony of C. J. Hurley.)

Q. Did you make any investigation, other than what he said, whether that was true?

A. Nothing further than going to Tom Morgan and inquiring further about Mr. Williams.

Q. You didn't inquire whether Richards and Williams were partners, of Morgan, did you?

A. Yes, sir.

Q. He didn't know anything about it, did he?

A. I asked him his opinion, and he recommended Mr. Williams—

Q. *What* a minute.

Mr. McGOWAN.—Let him finish his answer.

Mr. PRATT.—I didn't ask him anything of that sort.

The COURT.—Answer the question.

A. I don't know if he knew of his own knowledge. That was the belief with him, that they were.

Mr. PRATT.—Q. Did you make any inquiry of anybody else? [153] A. No, sir.

Q. Did you do any wiring?

A. No, sir. I couldn't.

Q. In a day or two you made that loan, did you?

A. There was no telegraph station there to do any wiring. It would take a matter of two months to telegraph and get a reply.

Q. In a day or two after that, you made that loan?

A. Yes, sir. I may have made it the same day.

Q. You did it on the strength of him telling you that Dick Richards was his partner?

A. Yes, upon Mr. Richards' name.

Q. Did he tell you that he had a power of attorney

(Testimony of C. J. Hurley.)

or a written authority to sign his name to papers?

A. I don't think the matter ever came up at that time.

Q. You are sure about that?

A. Yes. I am quite sure about it.

Q. Quite sure?

A. Yes. I didn't request him to sign it, only in the firm name of Richards & Williams. And that was the way he applied for the loan.

Q. You made him a loan of \$3,500.00 that day, and paid the money or put the money to his credit in your bank? A. Yes, sir.

Q. Before that, he had brought \$2,100 there that he had brought with him, and deposited it?

A. Yes, sir.

Q. And on your suggestion he deposited it in the name of Richards & Williams, didn't he?

A. Not upon my suggestion. He asked in what way to handle the account.

Q. Upon your advice, then, he did that?

A. Yes, sir. [154]

Q. Didn't he tell you that he had tried to get a loan from the Miners & Merchants' Bank on his own name, on his own responsibility?

A. I don't recollect that he did. No, sir.

Q. He may have told you something like that?

A. He may have. If he did, it would not have been of any significance.

Q. You would have not loaned him a cent on his own name.

A. No, sir, nor the Miners & Merchants' Bank

(Testimony of C. J. Hurley.)

wouldn't have loaned him any money on Richards' name.

Q. The only reason you loaned him any money was that you knew Richards and had confidence in him? A. Yes, sir.

Q. After he got that money, and at the time he got that money, isn't this true, that one or the other of you said that Williams should notify Richards and see whether that was satisfactory or not?

A. No, sir. There was never anything of the kind said.

Q. Nothing of the kind? A. No, sir.

Q. By anyone?

A. Richards borrowed the money—

Q. What?

A. Williams borrowed the money, and was going to notify Richards and get the money from him. The note was made for ninety days.

Q. And Williams was going to notify Richards.

A. Yes, sir. That was the basis on which I made the loan; that he was going to get the money from Richards; that Richards—(interrupted).

Q. That is, you requested him—(interrupted).

A. I didn't request him. [155]

Q. You requested him to notify Richards?

A. I didn't do no such thing.

Q. I thought you said that was the consideration upon which you loaned him the money; that he was to notify Richards.

A. That was the basis upon which I made the loan, yes, sir. That was his own proposition—(interrupted).

(Testimony of C. J. Hurley.)

Q. You asked him—(interrupted).

Mr. McGOWAN.—I insist that the witness should be allowed to finish his answer.

The COURT.—Wait until he finishes his answers.

Q. Did you finish your answer to the last question?

A. When he made application for the loan he wanted the money long enough that he could write Richards and Richards could send the money down, and it was made for ninety days to give him ample time.

Mr. PRATT.—Q. And in some way you acquiesced in that; that you wanted or expected him to notify Richards?

A. I certainly supposed he was going to write to Richards for the money to take care of that note; yes, sir.

Q. Didn't you ask him that when he got a reply from Richards to come and let you know what it was? A. No, sir. I don't recollect.

Q. You are not sure about that?

A. Yes, I am sure about that.

Q. Did you notify Richards in any way at all?

A. No, sir.

Q. Did you ever notify him in any way about this note of February 24th, the one that is in suit here? Did you ever notify him about that at all until nearly the first of the next year? A. No, sir.

Q. You never mentioned the subject to him?

A. No, sir. [156]

Q. You never wrote him any letters on the subject at all, or your bank? A. No, sir.

(Testimony of C. J. Hurley.)

Q. You never sent him any word by anybody?

A. No, sir.

Q. Mr. Hurley, isn't it true that during the months of January and February now, 1911, after that first note had become due, that you were pressing Mr. Williams for a settlement and for payment? Isn't that true?

A. Certainly. The other note was due—past due.

Q. A number of different times?

A. A couple of times I think is all I saw him, two or three times.

Q. Didn't you ask him and press him to tell you what Mr. Richards had said in response to his letters? A. No. I don't know as I did.

Q. Didn't you ask him if he had notified Richards, and didn't he tell you he had?

A. No, sir, I didn't. I believe I asked him if Richards had sent the money down to him, and he said no. And that is the time—I don't know for certain if I asked him that time—when he told me that Richards wasn't in a position to send the money at the time; that he was in poor health and wasn't coming down himself, and had arranged to work on a large scale on Cache Creek, and therefore hadn't the money to spare at that time.

Q. When was that?

A. That was about the time I took the renewal note; at that time.

Q. In February? A. Yes, sir.

Q. How many letters did he speak of as having gotten from Mr. Richards in January and February,

(Testimony of C. J. Hurley.)

1911? [157] A. One letter is all I recollect.

Q. One is all that you remember of?

A. Yes, sir.

Q. Williams represented that that letter that came from Mr. Richards stated that he wouldn't send any money? A. Yes, sir.

Q. Didn't Williams also tell you that Richards in that letter had complained of him, and had denied his authority to sign the note? A. No, sir.

Q. Didn't he say something to that effect?

A. No, sir.

Q. He didn't? A. No, sir.

Q. Didn't Williams ask you to relieve Richards, at or about the time that you took this note that is in suit, of all responsibility?

A. I couldn't say for sure whether he did or not.

Q. You won't say whether he did or not?

A. No. He may have asked me to.

Q. Didn't you agree to do that when you took this new note, and took a mortgage on that Flat Creek property as security in place of Richards?

A. I certainly did not.

Q. You did take a mortgage on that Flat Creek property?

A. Yes, sir, and I took it in the name of Richards & Williams.

Q. Did you think at that time that was a valuable piece of property? A. I did not.

Q. You didn't?

A. I didn't know anything about the property any more than when I made the first loan.

(Testimony of C. J. Hurley.)

Q. It was on a creek where there were valuable mines? [158] A. Yes, sir.

Q. Presumably it was a good security for that loan?

A. No, sir. Mr. Boulton applied to me for a loan of \$5,000.00 more than once, and I loaned him \$1,500 on that security, and no more, and I wouldn't loan him any more.

Q. That was on Boulton's quarter or half?

A. On his interest whatever it was.

Q. A quarter or a half?

Mr. McGOWAN.—It was a half.

A. I loaned that before I made this loan, but Boulton wanted more at the time, and several times came to me and wanted more money on his interest, and I wouldn't advance it.

Q. You loaned to Boulton in the summer of 1910?

A. September, 1910.

Q. By February of 1911 things were picking up there on Flat Creek, and mining claims were more valuable, were not they?

A. There was not anything doing on this particular property that I know of.

Q. Up to that time you thought that if Richards was liable on that note that you were just as safe as you need be, didn't you?

A. Yes, sir, and I felt that he was liable.

Q. Now, sir, if you felt that way, and you didn't intend to release Richards, what did you take that mortgage for?

A. It was always customary to take security in

(Testimony of C. J. Hurley.)

connection with a note whenever you can get it,—

Q. You didn't ask—(interrupted).

A. —no matter how good a man is.

Q. You didn't ask for any mortgage on that first note, did you, of October 6, 1910?

A. No, sir. I made that for ninety days.

Q. And the other one you made for substantially 90 days? [159]

A. More than 90 days, to July 1st.

Q. March, April, May and June; that is four months.

A. And three months more. The same loan had been running already for seven months.

Q. When you made that second note and the mortgage, you were told distinctly then that this man Williams did not have any power of attorney or any written authority from Richards.

A. Certainly. I never understood that he had.

Q. You had been told before that that Richards had written a letter to Williams in which he had declined to do anything about that debt. A. No, sir.

Q. In which he had declined to pay it.

A. No, sir.

Q. Didn't you just tell the jury that Williams told you that Richards had written to him that he was sick, and didn't intend to come down there, and wouldn't advance any money, or wouldn't do anything?

A. That he didn't have the money to spare at that time.

Q. Didn't have the money to spare.

(Testimony of C. J. Hurley.)

A. Yes, sir, at that time.

Q. You knew that? A. Yes, sir.

Q. And you knew that this man didn't have any power of attorney? A. Yes, sir.

Q. Didn't you say right in that connection now, "Well, it ain't business for me to take these papers from you, signed up this way. You purport to sign as though you were an attorney in fact, when you haven't any power of attorney. It is not business for me to do it, but I will take a chance on it"?

A. No, sir, I did not. [160]

Q. Didn't you use words to that effect?

A. No, sir, I did not.

Q. Didn't you say something like that?

A. I told Williams I saw no reason why the mortgage should be executed in their individual names; that that was not my intention when I took him over to Major Albrecht's to have the mortgage drawn up.

Q. In their individual names?

A. Yes, sir. My instructions to Albrecht was to draw up the mortgage in the name of Richards & Williams.

Q. Mr. Hurley, you are a banker and a business man, and take lots of mortgages. A. Yes, sir.

Q. Didn't you know at that time, as well as you know now, that each member of a partnership, whether it is a mining copartnership or any other kind, has got to sign a real-estate mortgage? Didn't you know that?

Mr. McGOWAN.—We object to that as calling for

(Testimony of C. J. Hurley.)

a conclusion of law. It is not right and is not the law, anyway.

Mr. PRATT.—The witness is trying to say that he didn't want any individual names signed; that he wanted a firm name.

A. It was never put there at my request or at my suggestion.

Q. I asked you if you didn't know that all real-estate mortgages made by a copartnership must necessarily be signed by each individual copartner?

Mr. McGOWAN.—We object to that as not the law, as this is merely a lay; and it is calling for a legal conclusion.

(Objection sustained. Deft. Richards excepts.)

Mr. PRATT.—Q. Didn't you then and there request Williams—by that time you had found out that the assignment of that lay over there on Flat Creek had been taken in the name of Richards & Williams?

[161] A. I believe it—(interrupted).

Q. The time the mortgage was given?

A. I don't remember any circumstances connected with that deal at all.

Q. You don't? A. No.

Q. You didn't inquire into that? A. No, sir.

Q. Didn't you care?

A. Major Albrecht at the time was to inquire into the records, and see that any mortgages taken were given in the proper form.

Q. You got it from some source that that assignment of lease was in the name of Richards & Williams? A. Yes, sir.

(Testimony of C. J. Hurley.)

Q. Didn't you tell Mr. Williams at that time that if he would send a bill of sale up here to Richards and get him to sign it, conveying back his ostensible interest in that lay to Williams, that you would release Mr. Richards altogether? A. I did not.

Q. Nothing of that kind?

A. Nothing of that kind.

Q. Didn't you know that Williams did send that very bill of sale up here to Richards?

A. I may have known it at the time. Yes.

Q. As a matter of fact you remember that he did do it at that very time, don't you?

A. No, sir, I do not. I don't know when he sent that bill of sale up here.

Q. When you did know it, didn't you know what he was doing it for? A. No, sir.

Q. When it came back, didn't he come to you and ask you to fulfill your promise?

A. No, sir. [162]

Q. And release Mr. Richards? A. No, sir.

Q. And didn't you then refuse to? A. No, sir.

Q. Did you hear his testimony? A. Yes, sir.

Q. He is your witness?

Mr. CLARK.—That is self-evident.

Mr. PRATT.—He testified to all that.

Mr. CLARK.—We object to that. That is not his testimony.

The COURT.—Objection sustained. The jury will disregard the statements of counsel.

Mr. PRATT.—Q. What steps did you take to col-

(Testimony of C. J. Hurley.)

lect that debt during the summer, from Mr. Williams?

A. When it came due, I didn't take any legal steps. I kept urging payment every time I would see him.

Q. Didn't you get some of the gold-dust from the cleanups? A. Yes, sir.

Q. What amount?

A. I don't remember the amount.

Q. What was the value of it?

A. The value per ounce?

Q. Yes. A. In the neighborhood of \$17.

Q. No, no. The value of the gold-dust that was turned over to you? A. I haven't any idea.

Q. A thousand dollars?

A. More than a thousand dollars.

Q. Several thousand dollars? A. Yes, sir.

Q. The cleanups were very large there at first?

A. Yes, sir.

Q. It looked as though they had a great big thing for a while? [163]

A. I don't know as it looked that they had a great big thing. It was expensive ground to work. The production was pretty good, but it was very expensive to work.

Q. You didn't try to collect until after the 1st of July, did you?

A. No. The note wasn't due until the 1st of July.

Q. How long after the 1st of July were results good over there on Flat Creek?

(Plaintiff objects as immaterial. Overruled.)

Q. How long after the 1st of July were the mine

(Testimony of C. J. Hurley.)

results good on that claim?

A. Oh, from the 1st to the middle of July they began to clean up.

Q. After that they got pretty lean?

A. No. Their cleanups were pretty good until into August, as I remember it.

Q. Were you there for your division every time they cleaned up? A. What division?

Q. To get a part of your debt, your back debt.

A. No, sir.

Q. You were not looking after it very close?

A. Yes, sir.

Q. They had cleanups there every few days, didn't they? A. Yes, sir, every week.

Q. Did you have a man there at the time to try to collect something on that debt of yours?

A. No, sir.

Q. How many times did you send there to try to collect that of Williams?

A. I guess I sent a man out there a matter of half a dozen [164] times in August.

Q. In August. How many times altogether from the first of July until the end of the season, do you say?

A. From the first of July to the end of the season?

Q. Yes. How many times did you send there to try to get that money?

A. A half a dozen times; something in that neighborhood.

Q. About half a dozen times altogether?

A. Yes, sir.

(Testimony of C. J. Hurley.)

Q. And you got several thousand dollars on those trips? A. No. I didn't get anything on them.

Q. Nothing at all?

A. No, sir. They made no payments on the note.

Q. They must have had other debts.

A. Certainly they did, just as all men have right here to-day. We don't collect our loans until everything else is paid, mining loans.

Q. Who was he operating with? Who was he mining with?

A. That summer the firm was called McKenzie, Williams & Company.

Q. Did you collect all that was due from the firm of Williams, McKenzie & Company? A. No, sir.

Q. How much is back on that?

A. An overdraft of \$300 and some odd dollars.

Q. That is the one that is here? A. Yes, sir.

Q. What did you say the name of that firm was?

A. Williams, McKenzie & Company or McKenzie, Williams & Company. I am not certain which.

Q. How much in value, of dust, did you collect from that firm of Williams, McKenzie & Company during July and August, or during the summer of 1911?

Mr. CLARK.—We object as immaterial. [165]

The COURT.—What is the purpose of it?

Mr. PRATT.—I am asking these questions with the idea of why he did not apply that on this note in suit.

A. I will state that McKenzie, Williams & Company owed us nothing except this overdraft, and a

(Testimony of C. J. Hurley.)

few checks I paid, running the overdraft to the extent of some three hundred and some odd dollars. That was all they owed us when the mine closed down.

Q. But they had been drawing on you all summer, hadn't they, Williams, McKenzie & Company?

A. Certainly. And they had been depositing gold-dust to pay their checks.

Q. In large amounts? A. Yes, sir.

Q. Fifty thousand dollars?

A. Possibly so. I couldn't state as to the amount; a large sum.

Q. A large sum, yes, sir; all checked out immediately, just as soon as it was deposited, in the payment of labor and other debts, wood, etc.

Q. Of course you knew that Richards had declined to pay this note, this debt, at that time?

Mr. CLARK.—He said six times he didn't know it.

The COURT.—That has been answered several times.

Mr. PRATT.—Q. Did you ever see any of the letters that came to Williams from Richards? (Objected to. Objection withdrawn.) Did Williams ever show you any of the letters that Richards sent down to him?

A. Those letters that have been offered here in evidence are the only ones that I ever saw.

Q. When did you see them first?

A. Along the latter part of August or first part of September. [166]

Q. You sent a man by the name of Adams up there where Williams was to get some evidence, didn't you?

(Testimony of C. J. Hurley.)

A. Yes, sir, to get the letters or the correspondence between him and Richards, and those letters are the ones he brought back to me, and those letters gave me no notice, and don't to-day, of Mr. Richards' repudiation of the note.

Q. You know about another one of about December 16th that used plainer language, don't you?

Mr. CLARK.—We object, as not in evidence, and not cross-examination.

The COURT.—He may answer.

A. I have heard you talking considerable about it, but that is all I know about it.

Mr. PRATT.—Q. Haven't you heard Williams tell about it too? A. No, sir, I have not.

Q. Mr. Hurley, I will ask you if you gave this testimony at the second trial: (Reads:)

“Q. He told you that Richards had staked him to that amount of money— A. Yes, sir.”

That refers to the \$2,500.

“Q. To come down there and purchase something.

A. And also told him that if he required more money that he would send it down to him.

Q. He made that statement to you. A. Yes, sir.

Q. Now, then, you say that you made that note payable in ninety days especially so that Richards could be notified. A. Yes, sir.

Q. Did you take any steps to inform him?

A. No, sir.

Q. None whatever? A. No, sir.

Q. Did you suggest to Mr. Williams that he inform him?

(Testimony of C. J. Hurley.)

A. Mr. Williams was to write him and inform him, and request him to send the money down.

Q. He was. A. Yes.

Q. Did you especially request Mr. Williams to do so? A. No, sir."

Mr. CLARK.—We object to that, as that is the testimony here to-day that is not in contradiction of anything he stated.

The COURT.—Objection sustained.

(Deft. Richards excepts.) [167]

Mr. PRATT.—Q. Mr. Hurley, you have stated to this jury that you made this loan of \$3,500 on the statement of Mr. Williams that a man by the name of Richards, whom you knew lived up at Hot Springs, was his partner; on the strength of that you made that loan of \$3,500.

A. Yes, sir, after being so highly recommended by business men.

Q. Without making any inquiries at all as to whether that was true as to their being partners.

A. There was no one to inquire of down there, other than Morgan, that I knew of.

Q. Are you in the habit of doing business as a banker that way?

(Plaintiff objects as immaterial. Objection sustained, and deft. Richards excepts.)

Q. Mr. Hurley, did you ever make a loan under such circumstances as that before?

Mr. CLARK.—We object as immaterial.

Mr. PRATT.—Just on a naked statement of that kind?

(Testimony of C. J. Hurley.)

Mr. CLARK.—We object as immaterial.

(Objection sustained. Deft. Richards excepts.)

Mr. PRATT.—That is all.

Mr. CLARK.—That is all.

Mr. CLARK.—With the exception of putting on attorney to testify concerning the attorney's fee, that is our case. We didn't expect to finish so soon, or we would have had him here. We ask to put that testimony in before the case is finally closed.

Mr. PRATT.—We prefer that that evidence be put in before we begin.

The COURT.—I think you will not be at any disadvantage if they are allowed to do that.

Mr. PRATT.—If the Court please. We move for a nonsuit in this case on the ground that the plaintiff has not produced [168] sufficient evidence to go to the jury. The complaint is based upon a promissory note purporting to be signed by an attorney in fact, that is, one of the signatures. The proofs of the plaintiff's own witnesses, and other witnesses, are that the person who signed these papers did not have any power of attorney. The only thing left them would be that there was proof here sufficient to make a *prima facie* case of a mining copartnership. (Argument.)

(Motion denied. Deft. Richards excepts.)

[Testimony of Edwin Richards, in His Own Behalf.]

EDWIN RICHARDS, defendant, sworn as a witness in his own behalf, testified as follows, to wit:

Direct Examination. [169]

“I am the answering defendant in this case. My

(Testimony of Edwin Richards.)

name is Edwin Richards, commonly known as 'Dick Richards.' I have lived in this part of the country since 1905. I was in Dawson before that. I have mined in the upper country and I have done mining in this neighborhood. I have mined on 2 above Dome Creek. In February, 1906, I started in over there. We were there until July, 1908, and then I went down to Hot Springs. I knew Williams first in Dawson on Dominion Creek. He came down here before I did. He never worked for me in Dawson; he worked for me on Dome Creek. I think it was from February until May of the next year, about fifteen or sixteen months. He was helping me in general around there when we started in. We were sinking a hole, but when we had men enough, he went to cooking. He was cooking there at my place most of the time. I have seen Boulton over there on Dome, too. I wasn't much acquainted with him, but he used to drive points at Maddocks on the next lay, and I used to see him going up to see Williams at the cook house in the morning after he was through work. He was working nights. Once or twice he came to the boiler-house there and passed the time of day with me. I did not have any particular acquaintance with him. I first went down to Hot Springs in August; and then went down again in September, 1908. The second time, when I took the plant down there, Williams was—I don't know whether he went on the same boat, but he spoke about coming down. He said he was coming down. He was going along with me. He wanted to know if there was anything doing down there, and I told him

(Testimony of Edwin Richards.)

yes, and he came down. I can't say for sure whether he came on the same boat, but he was there when I got there. I told him he would get a job as soon as I had one when I got down there. He worked for me a few weeks and for a while in the fall, and during March and until September, 1909. He cooked that summer. I was working a lay over on Cache Creek. That is where my home is and my mining operations. I gave Williams and a man named Johanson a lay in 1909. I went out in the fall and turned the lay over to Williams and Johanson, Johanson was my old partner on Dome and they both wanted to take it over when I went out, to work that winter, so I turned the plant, and stuff I had there in the mess-house, wood and everything over to them and left them a little credit at Morrison's besides, to help them to start. Neither one of them had much. Williams had a little more than Johanson had at the time. They worked that lay for pretty near a year; I think they quit about August, 1910. The results were bad. That is, they hadn't made anything themselves, and they had been working hard there, and they were in debt when they got through. There was something between six and seven hundred dollars still owing to me. Then there were some other debts left around besides. They quit the lay. I returned in the spring of 1910, about the 2d or 3d of April. I was over on Cache for about two months. I guess in my own place, but I got hurt and went to the hospital, and was in Gibbon a good deal of the time that summer. I was living in the same mess-house and the same place that Williams

(Testimony of Edwin Richards.)

and Johanson did and had a cabin close by there, adjoining. We had a telephone there. The phone was there when I got back from Gibbon. I paid my share so the phone from that time on was a kind of a partnership phone. I guess Williams and Johanson paid for it until that time. Q. State whether you were a partner with them in any way, shape or form. A. No. There was no partnership whatever. I had a conversation with Williams in the spring of 1910 about Jack Boulton." [170]

A. He told me sometime that spring that he had a letter from Jack Boulton; that he had a lay down in the Iditarod, a pretty good lay, he thought, on Flat Creek.

Q. I wish you would relate to the jury all that you remember that he and you said about that.

A. Well, he didn't say a good deal about it. But it was supposed to be a good lay, and I guessed it was in a good location from what he said, because the general reputation from that part of the country was good.

Q. You say you guessed that. What made you guess that—who told you so?

A. Well, Williams told me some of it.

Q. Williams told you so? A. Yes.

Q. What did you do about that; anything at all?

A. No, I didn't do anything about it.

Q. Did you ever see or talk with anybody else, talk with any person who had been down there and come back? A. From the Iditarod?

Q. Yes.

A. No, sir, not that I know of. I remember that

(Testimony of Edwin Richards.)

Tom Williams came by there, and he went down; and I remember when Williams spoke of the matter, that he had gone to Hot Springs, and asked me to call Tom up and ask him to look at that lay after he got down there and see what it was.

Q. Yes?

A. But I don't believe Tom ever sent no answer at all about it.

Q. Edward Williams asked you to call up Tom Williams? A. Yes, sir.

Q. Did you do it? A. Yes, sir.

Q. Where did you get him?

A. He was at Hot Springs ready to leave. [171]

Q. What did you ask him to do for Williams?

A. To see what kind of a lay Jack Boulton had.

Q. Then, when you found out what kind of a lay he had, what did you ask him to do?

A. He didn't know anything about it. He was just going down there.

Q. What did you ask Williams to do when he got the information?

(Plaintiff objects. Overruled.)

Q. Don't you see what my question is? What information, and on whose behalf were you trying to get information from Tom Williams?

A. For Ed Williams.

Q. What made you do it?

A. Ed wanted me to.

Q. How were you situated there in a mining way at that time on Cache Creek?

A. What do you mean—financially?

Q. No. I want to know if you were foot-loose and

(Testimony of Edwin Richards.)

could have gone any place you wanted to, or whether you were stuck there and had a plant there, and had a mine that you had to attend to.

A. Well, I had a lot of ground there, and some of it I could go to work on.

Q. What about mining machinery and plant?

A. I had plenty of it there, a plant, a regular mining plant, you know.

Q. What were you doing? What did you start to do yourself after you got back from the hospital at Fort Gibbon in August of 1910?

Mr. McGOWAN.—We object to that as irrelevant, incompetent and immaterial. (Objection overruled.)

A. The first thing in the fall I wanted to sink a few prospect [172] holes because it was too early to start in tunnelling at that time, on some ground there that I was going to work that coming summer and open up in the spring. Just then I was preparing to sink a few prospect holes on some ground there that I didn't know whether there was anything in it or not.

Q. Will you state whether you were mining ground of your own there or had a lease on mining ground there where your plant was?

A. Yes, I had lots of ground.

Q. Were you owner or lessee?

A. I owned an interest in quite a bit of ground there, some fifteen or twenty claims; that is, some kind of an interest; some small, and some half, or a little better.

Q. Was your mining plant extensive or small and petty?

(Testimony of Edwin Richards.)

(Plaintiff objects as incompetent, and immaterial.
Objection sustained.)

Q. Mr. Richards, you remember the circumstance of Mr. Williams getting a telegram, or you getting a telegram, from Boulton? A. Yes, sir.

Q. That has been introduced here in evidence.

A. Yes, sir.

Q. What did you do with that telegram?

A. I received that telegram up at—I happened to be in Howell & Cleveland's mess-house at the time when I heard our ring on the phone—the ring we had down at the other place—so I took it down there, that is, took the message down on a piece of paper there. That was along towards evening. And I stayed a little while, until I went back down to our own mess-house where we stopped, and I don't—at the time I don't think Williams was in the house when I went in. I think he came in a little while afterwards, though, and when he came in, I showed him this telegram and he read it. And I [173] can't go into very close details on it, but I made this remark, that I didn't think this telegram was meant for me, and asked him if he didn't think it was meant for him. And Williams said he didn't know but it might be. I am telling you the general talk. We might have talked half an hour.

Q. I want the substance, and the important features of that conversation.

A. Anyway, I said that I wouldn't for my part send any money to anybody on a telegram like that, to Boulton or anybody else. And he—let's see. So, anyway, finally I told Williams that I didn't want to

(Testimony of Edwin Richards.)

go down or send any money down; if it was meant for me, I didn't want anything to do with it whatever. Then I asked Williams if he would like to go down there, and he said yes, he would like to go down, "But what is the use? I have not got anything to go down with." I says, "Well, if you think you could do yourself any good by going down there I would give you the money to go down." He thought a minute and then he said he would, being that he knew Jack so well and everything—he thought he could make a good deal, and decided there that he would go that evening. And I intended—the next day I was going to come up to Fairbanks anyway, as I had to get some more machinery, and I was going to leave the next day for Hot Springs, and I left the place about 9 o'clock.

Q. To refresh your memory: After you got that telegram, do you remember to have gone the next day or the next evening to Tofty?

A. No, I didn't go to Tofty, but Williams went to Tofty, I think, the next morning.

Q. What did he go there for?

A. He was going to see somebody that came from the Iditarod. [174]

Q. Do you know who it was?

A. I think it was Merrifield.

Q. What time did he get back?

A. I don't know.

Q. Hadn't he got back by the time you left for Hot Springs?

A. No. I left about 9 o'clock, something like that, if I remember well.

(Testimony of Edwin Richards.)

Q. And he had gone?

A. He had already gone to Tofty, the other way.

A. He was going to start, to come into Hot Springs and start from there.

Q. What had you done, with reference to staking him, up to that time, if anything?

A. Well, I had told him that I would give him the money to go. I don't know if I gave him any money or not, but I might have given him a little currency, on the place; but I couldn't swear to that, but I kind of think I did. But when I gave him the \$2,300.00 was at Hot Springs the next morning.

Q. Have you got the check you gave him there?

A. Yes, sir.

Q. Where is it?

A. I have it in my pocket here somewhere (produces same).

Q. Is that it? A. Yes, sir.

Q. What is the date of it?

A. This is September 16th.

Q. Do you know what date he left to go down the river?

A. I think he left the springs that day in the afternoon and went down the slough there somewhere.

[175]

Q. Does that date there refresh your memory as to when you drew that check, and where you were?

A. I was at Hot Springs that date.

Q. You are sure of that, are you? A. Yes, sir.

Q. Is there any other circumstance that makes you know it, besides the date of it? A. No.

Q. The condition of your bank account or any-

(Testimony of Edwin Richards.)

thing of that kind?

A. My account at Fairbanks, I think, was not enough to cover that check, and I wanted to be sure there was nothing went up ahead of me, and I wanted to explain the matter to Mr. Curtis in case—that I was going to go up on the first boat, anyway, and I wanted to give him to understand that in case—

Q. You explained to Curtis that you didn't have money enough?

A. There was not enough,—(interrupted).

Q. There was not enough on deposit, and you were coming up here to Fairbanks to make it good.

A. Yes, sir.

Q. Does that circumstance make you know where you were when you signed that check?

A. Yes. Sure.

Q. What conversation, or transaction, if any, did you have with Mr. Williams there in Hot Springs that day?

A. Well, there was something regarding this interest that Boulton had. It was evident from the telegram that there was something wrong about it; it says, some squeeze, or whatever word he used, in that telegram—"a freeze-out game," that was it—a freeze-out game. So, evidently, there was some trouble regarding it, whatever it might be. And Williams, in leaving, he said that he would thoroughly investigate the condition of this lay before he would put any money into it after he got down there. [176]

Q. What, if anything, did he say about being min-

(Testimony of Edwin Richards.)

ing partners, or working mining ground down there, or anything of that sort?

A. We didn't say anything of that kind at all. I just gave this money to Williams to give him a start down there. I staked him to it.

Q. How were you fixed financially at that time?

A. I was fixed all right.

Q. So that handing him \$2,500.00 didn't make any difference in your financial affairs, did it?

A. I had a little left at the time, yes, sir. Williams had been along with me a long time and I always tried to help him out, and, besides, they had worked hard on that ground, on that lay, and they had made nothing and were broke, were practically down and out, and I would like to see Williams make something.

Q. What, if anything, did he say to you the last time you saw him there in Hot Springs?

A. Well, one of the things he said, that I could depend on him that he wouldn't put a dollar into that ground unless everything was clear and he could see his way through with the money he had; and besides he says, "I appreciate your kindness in giving me this money to go down, and I will do the right thing by you."

Q. You heard Williams' testimony at this *second* trial, that in the N. C. Company's store there, apparently in the presence of Mr. Curtis, you told him that when he got down there if he needed more money you would go stronger than you had already. What do you say about that?

A. No, sir. I never said no such thing.

(Testimony of Edwin Richards.)

Q. Was there anything said at all about your putting in more money, or giving him any more money, upon any theory or for [177] any purpose?

A. No, sir, not a thing of the sort. *He taken* the \$2,000.00 down there, and if it was not sufficient to go into that deal that he would not go into it.

Q. You gave him the \$2,500.00 so that he would have \$2,000.00 left when he got there.

A. Yes, the \$500.00, he was to use that for his fare, and he had to get some clothing in the fall and some grub for himself for the winter.

Q. Well, now, he left on the boat, and where did he go?

A. I left on another boat for Fairbanks, on the steamer "Tanana," I think it was.

Q. When you came up here, you wrote that letter to him of September 21st?

A. Yes. I met some people on that steamer, and I had a better idea of what the conditions were in the Iditarod. I never knew before, and never had a good line on what kind of ground, or whatever there is down there as to *to* working of ground, what it was, all the conditions of the ground in general.

Q. After getting that information, your idea was that you didn't want him to get that money of yours tied up.

Mr. McGOWAN.—We object to that as leading, suggestive, irrelevant, incompetent, immaterial, calling for the contents of a written instrument.

(Objection sustained. Deft. Richards excepts.)

Mr. PRATT.—Q. How long did you stay here in this town?

(Testimony of Edwin Richards.)

A. Oh, I don't think I was here very long.

Q. Where were you doing your banking business at that time? A. The Washington-Alaska Bank.

Q. That took you back down there in September, 1910, did it not?

A. Yes, sir, back to Hot Springs. [178]

Q. You got back down there in September or October, 1910?

A. Yes. About four days would be about all I was here.

Q. Where did you stay during the winter of 1910 and 1911?

A. I was on Cache Creek in the Hot Springs District.

Q. What were you engaged in—what kind of business?

A. Well, I was doing a little prospecting in the fall for a little while until I got started sinking a shaft later on in the winter, and getting some wood and running tunnels.

Q. In other words, you were mining down there.

A. Yes, sir, mining; general mining.

Q. On a large scale or a small scale, generally?

A. Well, it is what you call a 40 or 50 horse-power plant.

Q. Did you stay there all the summer?

A. Yes, sir.

Q. Mined that season? A. Yes, sir.

Q. When did you leave there?

A. I left there about the end of September.

Q. Where did you go?

A. I went down to San Francisco.

(Testimony of Edwin Richards.)

Q. In the meantime, in September or October, 1910, until— What month did you say you left in 1910?

A. About the end of September, I guess it was.

Q. You were there and mined on Cache Creek in the Hot Springs District. A. Yes, sir.

Q. In this country. And you had this correspondence in the meantime, during that time, with Mr. Williams. A. Yes, sir.

Q. Did you ever have any correspondence at all with the bank? A. No, sir.

Q. Did you ever get any notification or notice from them of any kind?

A. No, sir, not a word. [179]

Q. Did you ever get any at all after that?

A. After that, yes.

Q. Now, then, up to the time that you left that Hot Springs country in September of 1911, had you any notice from anybody, Williams, or the bank, or anybody else, about this note that is in suit, dated February 24, 1911? A. No, sir.

Q. What particular note had you had some talk about, or had some letters with reference to?

A. The note made out in October.

Q. With reference to that, you had written several letters, had you? A. Yes, sir.

Q. Two of them have been read here in evidence.

A. Yes, sir.

Q. Now, sir, was there another letter between those two, on or about the 16th of December?

A. Yes, sir, there was another one.

Q. Who was that addressed to?

(Testimony of Edwin Richards.)

A. Edward Williams.

Q. Was that mailed to him? A. Yes, sir.

Q. What, if anything, do you remember about you stating distinctly in that letter about his having signed your name to the note of October 6, 1910?

A. Amongst other things—I don't remember the whole contents of the letter, but I know I put in this sentence in there, so as to impress upon Williams for doing that: "I will not be responsible for any notes or whatever else you may have signed my name to. Now, let me know as soon as possible if [180] you have revoked the same."

Q. After that, and in response to that, did you get any other letters from Williams with reference to that, with reference to doing that, or trying to do it?

A. Yes, sir.

Q. What was the purport of those letters?

A. The letter I received sometime along about the first part of May, I think it was. That was the first one I think I had regarding the matter.

Q. Is that one of the letters that was read here in evidence? A. Yes, I think so. Yes.

Q. Did you get a blank deed or conveyance of some kind?

A. I had a deed already made out, only to sign and swear to it.

Q. He sent it to you? A. Yes, sir.

Q. You signed that up and sent it back?

A. Yes, sir.

Q. When did you learn that he had bought a three-quarters interest, now, in the Boulton lay and taken an assignment in your name as well as his own?

(Testimony of Edwin Richards.)

When did you learn that?

A. The first letter I received about December the 5th or 6th I think it was.

Mr. PRATT.—Q. Was that the letter that informed you that he had taken an assignment of the lay in both your names? A. Yes. [181]

Q. Then you immediately wrote back to him to change that or revoke it?

(Plaintiff objects as irrelevant, incompetent, immaterial and not the best evidence; sustained. Deft. Richards excepts.)

Q. After that, you got this letter that you got in May in which he said he would do it, and enclosed the bill of sale. Is that right? A. Yes, sir.

Q. What did you do with that blank form of bill of sale?

(Objected to, as witness has said that he sent it back. Objection sustained.)

Q. Now, Mr. Richards, is there any intimation in any of the letters you got in the summer of 1911, and after February 24, 1911, that a new note and a mortgage had been given at that time?

(Plaintiff objects as not the best evidence; the letters speak for themselves. Objection sustained.)

Q. State whether any of the letters from Williams to you after February 24, 1911, during that summer, now, made any reference to a note and mortgage of date February 24, 1911.

(Plaintiff objects as calling for a conclusion, and not the best evidence. Objection sustained.)

Q. Mr. Richards, when did you find out from the

(Testimony of Edwin Richards.)

bank, we will say, that Williams had signed up a note, in your name, of February 24, 1911? When did you find that out?

(Plaintiff makes same objections. Overruled.)

A. It was on December 28th, I believe.

Q. What year? A. 1911.

Q. Where did you get it?

A. I received it in San Francisco.

Q. How did it happen to come there?

A. It was mailed to Hot Springs, and then re-addressed to Tofty, and then readdressed from there to San Francisco. [182]

Q. That letter was from the bank here?

A. Yes, sir.

Q. They notified you of this same note—(interrupted).

(Plaintiff objects as incompetent, asking for the contents of a written document. Objection sustained.)

Q. The subject of that letter was the note and mortgage of February 24, 1911?

(Plaintiff objects for the same reasons; sustained.)

Q. Did you reply to that?

Mr. McGOWAN.—We object on the same ground. If there is a reply, it is in writing.

Mr. PRATT.—Get that. (Addressing clerk.)

Mr. CLARK.—We object to that until the letter to which it is an answer is first introduced.

Mr. PRATT.—Q. I will show you this right now. Whose handwriting is that? A. My own.

Q. What is the date of it? A. January 2, 1912.

(Testimony of Edwin Richards.)

Q. Signed by yourself? A. Yes, sir.

Q. And addressed to whom?

A. Addressed to—(interrupted).

Mr. McGOWAN.—We object to that. It speaks for itself.

Mr. PRATT.—I offer this in evidence.

Mr. CLARK.—To which we object unless the letter to which it is an answer is introduced.

Mr. PRATT.—Then put them both in.

Mr. McGOWAN.—We object to both of them as irrelevant, incompetent and immaterial.

The COURT.—What is the purpose?

Mr. PRATT.—The purpose of this is to show that the minute he got [183] notice of this note in suit he repudiated it in this letter to the bank, and I will show by him that he never heard before in his life that there was such a note.

The COURT.—You cannot prove that in that manner. The objection is sustained to the letter.

Mr. PRATT.—We except. I will ask you that that he marked for identification. (Marked as Defendant's Identification 6.)

The letter sought to be introduced in evidence is an answer to the letter which counsel for plaintiff sought to introduce in connection with the testimony of Mr. Hurley just before the close of his direct examination, to which counsel for defendant Richards objected and which objection was sustained. The letter sought to be introduced at the time reads as follows: [184]

[Defendant's Exhibit 6—Letter, Dated January 2, 1912, Edwin Richards to American Bank of Alaska.]

San Francisco, Cal., Jan. 2/12.

Winchester Annex,
50 Third Street.
American Bank of Alaska,
Fairbanks.

Mr. Bruning:

Dear Sir:—

I have just received pass book and a note concerning a note from Iditarod for \$3,500.00 and overdraft for a sum \$327.00 which had evidently been long on way, but will comply with an answer at once, as it is a surprise to me. I am sure you are aware I have not signed that note, neither was Williams or anyone else authorized to do any business of that nature in my name, as for the overdraft, also I had nothing whatever to do with their operations at Iditarod. I stand ready at any and all times to settle my accounts, as my record up in Alaska will show, and if any further information in this matter is required, my address at present is above, but I expect to be in Fairbanks about end of March this year, when I will call on you on my way back to Hot Springs.

Respectfully yours,

EDWIN RICHARDS.

[Indorsed]: #1815. Third Trial. Deft's Ident.
6. Mar. 25, 1914. P. R. W. [185]

(Testimony of Edwin Richards.)

(The Court continues the trial until 10 o'clock tomorrow morning, and the jury withdraw in charge of the bailiffs.)

March 26, 1914, 10 o'clock A. M.

Jury present. Trial resumed.

EDWIN RICHARDS, resumes his testimony on direct examination and testified as follows, to wit:
(By Mr. PRATT.)

Q. Mr. Richards, you got a letter from Williams from the Iditarod dated October 24, 1910, which is in evidence here, in which he stated that he deposited some money—the balance of the \$2,500.00—in the American Bank of Alaska in the name of Richards & Williams at the advice of Mr. Hurley. Do you remember that letter? A. I do.

Q. October 24, 1910, was the date of the letter, signed by Mr. Williams, addressed to you, which you got on or about the 7th or 8th of December.

A. Yes.

Q. Do you remember the information in that?

A. Yes.

Q. That on the advice of Mr. Hurley, he deposited that money in the name of Richards & Williams.

A. Yes, sir.

Q. Do you remember whether there was anything said in that letter about checking it out?

(Plaintiff objects, as the letter speaks for itself. Objection sustained.)

Q. You responded to that feature of it in your reply of December 8th, did you not? A. Yes, sir.

Q. What, if anything, did you know about checks

(Testimony of Edwin Richards.)

on that bank from [186] that on until the first trial? A. I didn't know anything at all.

Q. Did Williams ever say anything to you, any word, about checks?

A. No, sir. He never said anything.

Q. Did the bank ever write to you and say anything about his drawing checks there?

A. No, sir, never did. The first time I ever seen any was here on the first trial. I happened to see a check here then.

Q. There was one at that time?

A. One, I think.

Q. To a man named Lund. That check has been introduced this time? A. Yes.

Mr. McGOWAN.—One check in, and you admitted the rest had been signed and put through in the same manner.

Mr. PRATT.—Undoubtedly. The checks are here, but the others were not marked at all.

Mr. McGOWAN.—No.

Mr. PRATT.—Q. Where were you during the winter of 1911 and '12?

A. I was down in California most of the time.

Q. What time did you get there?

A. I got there about the first part of November.

Q. When did you leave to come back here?

A. I left there about the 20th of March, 1912.

Q. Which way did you come; how did you come?

A. I came by way of Seattle and Chitina and through Fairbanks.

Q. Did you stop here at Fairbanks?

(Testimony of Edwin Richards.)

A. Yes, sir.

Q. How long?

A. I guess I was here four or five days.

Q. What bank were you doing your banking business at at that time?

A. In the American Bank of Alaska at that time.

[187]

Q. How long had you been, prior to that time?

A. Pretty near a year, I think; about ten months.

Q. Did you see Mr. Hurley at that time at the bank? A. Yes. I did.

Q. Did you have any conversation with him about this note? A. Yes, sir.

Q. What was it?

A. I went in the bank there, and told him the same thing as I told him in the letter from San Francisco—that I didn't see why he could expect me to pay the note; that I had nothing to do with it, and never authorized anybody to sign it, or anything of the sort—Williams, or anybody else.

Q. Was anything said about Williams being your mining partner? A. No, sir.

Q. Was anything said by you to—(interrupted).

A. I told him Williams or anybody else; that I never had a partner or anything in the Iditarod, Williams or anybody else.

Q. What did Mr. Hurley reply to that?

A. I don't quite remember what he said about it.

Q. What steps did he propose to take to try to collect it? A. He said nothing to me that day.

Q. At any time before you left.

(Testimony of Edwin Richards.)

A. Two or three days afterward, Mr. Hurley—I was going by—called me in the bank, and he told me at that time that he was going down to the Iditarod when navigation opened, and he said there was some of that lay—or that lay was still held, and good, and he thought he might recover on that lay, and, if he did, he was going to let me know about it during that fall some time.

Q. When were you sued? [188]

A. Along in October. They attached about the first part of September, 1912.

Q. The summons is dated the 14th of August, 1912. Was that served in September after that, do you think?

A. Yes. I think it was about the 4th or 5th of September.

Q. Did you hear anything from Mr. Hurley or the bank here between the time you talked to him here in March and the time the summons was served and the attachment made? A. No. Not a word, sir.

Q. You don't know what became of Mr. Hurley that summer.

A. No, I don't. I saw in the papers that he had went down there.

Q. There has been some talk here about a man by the name of Morgan who seemed to introduce Mr. Williams to Mr. Hurley. Did you ever know Morgan? A. I knew Morgan. Yes.

Q. Where? A. On Dome Creek.

Q. Did he ever live in the Hot Springs country?

(Testimony of Edwin Richards.)

A. No, sir, not that I know of. I am pretty sure he didn't.

Q. Did you even know that he was in the Iditarod country at that time?

A. Yes. I heard from Mr. Litsey, in Fairbanks here, that he had gone down there sometime; I can't say when.

Q. You never had anything to do with him in the Iditarod? A. Who—Morgan?

The COURT.—What is the purpose of this?

Mr. PRATT.—They seemed to try to make it appear that Mr. Morgan had a right to sell something.

The COURT.—There is no testimony to that effect.

Mr. PRATT.—Q. You heard the deposition of Joe Egler read, did you not? A. Yes. [189]

Q. In which he says that five or six weeks before the commencement of the sluicing season in 1912—(interrupted).

Mr. McGOWAN.—He didn't testify to anything of the kind.

Mr. CLARK.—He said, the next spring after Williams went down to Iditarod.

Mr. PRATT.—He tells it both ways, I admit. You can have it either way you want it. I don't care. (Continuing question:—) —in which he said that five or six weeks before the opening of the sluicing season in 1912 or 1911—I don't care which you put it—that you had a conversation with him on Sullivan Creek in which you proposed to sell your interest in some ground on Flat Creek—(interrupted).

A. No, sir.

(Testimony of Edwin Richards.)

Q. I think he said it occurred at Tofty—and told him that you were \$6,000.00 in that.

A. I never said no such thing, Judge, to Mr. Egler. There is lots of people down there asked me the same thing as he asked—I couldn't tell how many.

Q. What was your conversation?

A. What had Williams done down there? A lot of people asked me that about Williams.

Q. You did have some conversation with him along that line?

A. I might have had with him. I couldn't remember with him or anybody else, because so many asked that. It was so long ago that I couldn't make any difference between Egler or anybody else.

Q. What do you say about your telling him that you had \$6,000.00 in that lay there, and wanted to sell it to him?

A. I never said no such thing, Judge, to no one. I never had that money involved in the thing down there at all, and I had no reason to make that expression, none whatever. [190]

Mr. PRATT.—Q. In the spring of 1912, when did you get down there to Tofty and to Sullivan Creek?

A. I arrived there near about the 23d or 24th of April. They were almost through sluicing the dump where I was.

Q. He testified here that this conversation occurred at Tofty on Sullivan Creek before the sluicing season commenced five or six weeks. Were you there in that country at that time?

A. Not in that year; no, sir.

(Testimony of Edwin Richards.)

Q. In the year 1912? A. No, sir.

Q. You probably were, in 1911?

A. I was there in 1911. Yes.

Mr. PRATT.—Cross-examine.

Cross-examination.

(By Mr. McGOWAN.)

Q. You say that you didn't know much about Jack Boulton.

A. I wasn't much acquainted with Mr. Boulton. No.

Q. He was not a very good friend of yours—just an acquaintance. Is that right?

A. Just an acquaintance, yes, sir.

Q. And you didn't understand why he should send to you for \$2,000.00, of course, did you? A. No.

Q. Did you send Mr. Boulton a telegram about the 16th or 17th [191] of September that Mr. Williams was on his way down with money from Hot Springs?

A. I don't think I did.

Q. Are you sure?

A. Well, I wouldn't be sure, but I think there was a telegram sent, but I don't know whether I sent it or Williams sent it.

Q. Williams left at 4 o'clock in the morning, didn't he? A. Left the springs?

Q. Yes, sir.

A. I couldn't tell you for sure when he left.

Q. He left before the telegraph office opened that morning, didn't he?

A. I don't know on what date.

(Testimony of Edwin Richards.)

Q. You don't know. Didn't you, as a matter of fact, go over to the telegraph station and send a telegram to Boulton that Williams had left?

A. I don't remember doing it.

Q. You may have?

A. Well, I can't recollect doing it at all.

Q. Sir?

A. I don't remember doing it at all.

Q. You gave Williams this money and told him to go down there and do as he pleased with it. Is that right?

A. Yes, Williams was to use his own judgment on it.

Q. You told Williams to use his own judgment, did you?

A. No. This is the way, if I can explain it.

Q. Sir?

A. I will explain to you just the way he got it.

Q. Yes?

A. I asked Williams if he would like to go down, and Williams said he would, but what is the use, he didn't have the money [192] to go with. I said, "If you want to go, if you think you can do yourself any good, I will give you the money to go down with."

Q. That is all?

A. So he decided to go, and arrangements were made, and of course I gave him—we had some other talk, and he got the money, and went down.

Q. Yes, sir?

A. And he was to use his own judgment, of course.

(Testimony of Edwin Richards.)

That money, it was his own money to handle.

Q. Have you finished your answer?

A. Yes, sir.

Q. Did you tell him to use his own judgment, on the morning or on that day that he left?

A. Use his own judgment, yes.

Q. You did tell him to use his own judgment.

A. He said he would inquire into the matter, and see that it was all right, before he put it in.

Q. Did you tell Mr. Williams the day before he left, if he went down there to use his own judgment?

A. I told him to use his own judgment; yes, sir.

Q. That was after he had the money in his possession?

A. After the discussion took place, he was to investigate the matter, and, if he thought it was proper for him to go into the thing after he investigated the condition of the lay, that he could put this money into it and carry himself through, and he was going to put it in, otherwise he would not put it in at all, that he wouldn't put a dollar in.

Q. At that time there was not anything said about you going further, if necessary?

A. No, sir, I never said that.

Q. That part of the conversation where you told him to use his [193] own judgment, did happen, did it? A. I told him, as he went down, of course.

Q. Who hired the small boat that took him down there?

A. I got Sam Campbell to take him down to Gibbon. I didn't want to see Williams go down to Gib-

(Testimony of Edwin Richards.)

bon alone in a small boat.

Q. You attended to that?

A. I hired this man to take him down. Mr. Curtis had a wire from Gibbon and it said that the last boat was going to leave Gibbon the next day, and the only way to get down there was for Williams to go down in a small boat. I didn't want to see Williams go down alone in a small boat, and I sent the boat down and had the boat brought back.

Q. You hired a boat? A. Yes, sir.

Q. And hired a man to take him down?

A. Yes.

Q. And paid that man's expenses down and back to Hot Springs on the steamer with the boat?

A. Yes.

Q. All at your own expense? A. Yes.

Q. At an expense, and in addition to the \$2,500?

A. Yes.

Q. You talked over the situation about this Boulton lay with Mr. Williams quite considerably before he finally went down there, didn't you?

A. I never brought the matter up myself at all.

Q. Did you talk it over with him?

A. Williams used to talk about it occasionally.

Q. Williams talked, and you sat with your hands folded and listened to him?

A. I had no interest in it.

Q. Did you talk it over with him at all, or did you sit with your hands folded and listen to him? [194]

A. The two men sitting in the cabin together, he talks about Jack having a lay down there, and he

(Testimony of Edwin Richards.)

said he wanted him to go down there in the spring.

Q. Then you did talk it over with him?

A. Talked that way.

Q. That telegram, one of the exhibits in this case, fifty thousand at stake, looked pretty good to you?

A. It had no effect on me whatever.

Q. It didn't interest you a bit? A. No, sir.

Q. You testified on direct that you gave this money to Mr. Williams to start down there, staked him to it.

A. Yes.

Q. Is that correct? A. Yes.

Q. You expected no return from any earnings from this money?

A. I expected Williams to make good sometime, if he made it.

Q. Did you expect any share in the profits of the venture?

A. I did not, only what Williams said, that he would do the right thing.

Q. You didn't expect anything of that kind at all?

A. If he made it I guessed Williams would do the right thing with me; if he didn't, it was all right with me.

Q. What was your idea on that at that time—that he was to pay you back the money?

A. Sure! Pay me back the money whenever he could make it.

Q. Any interest?

A. I was interested in seeing Williams make a little money to pay his own debts that he had contracted working on that ground that I owned. I was inter-

(Testimony of Edwin Richards.)

ested in that way. I saw the man down and out, and I was willing to help him. I had the means to do it, and I gave him this money to go down there [195] and try to better himself.

Q. You already had on your books an account of six or seven hundred dollars against Williams, didn't you, that he owed you for working the lay before?

A. Six hundred and some odd dollars.

Q. Six or seven hundred dollars?

A. Something between six and seven hundred. That is against Williams and Johnston, against the firm.

Q. Out of this money, if Williams had gone down there and made twenty-five or thirty thousand dollars, what did you expect him to come back to you with?

A. That was all up to Mr. Williams, Mr. McGowan. I didn't stipulate a thing with Williams.

Q. You didn't expect a thing; is that right?

A. Williams told me he appreciated my kindness in giving him the money, and would do the right thing in return. Whatever Williams would do by me when he came back, if he made twenty-five thousand it was immaterial to me. I would be satisfied with whatever he would do.

Q. If he paid you your money back, you would be satisfied?

A. If he paid me my money back, I would be satisfied. He possibly would give me interest, anyway; and, if he had made more, possibly he would. I believed Williams would, but I hadn't bound him to anything.

(Testimony of Edwin Richards.)

Q. In other words, it was up to Williams to do what he liked; is that right?

A. I left that to Williams entirely.

Q. If he had made a hundred thousand dollars and hadn't given you a cent, you would not have sued him for an accounting? A. I couldn't do it; no.

Q. That is the way you felt about it when you started this man off? [196]

A. I wished he would have made it.

Q. Sir?

A. That is all. The best wish I wished him; I wished he had made it.

Q. You wrote all the letters to him that are in evidence here, did you not? A. Yes, sir.

Q. Is it not a fact that the money that you gave Williams at the time he left for the Iditarod was to be used for the mutual advantage of Mr. Williams and yourself?

A. That money was paid—that money was Williams'. I might benefit from it incidentally. I don't know. It was all up to how things turned out, and just the way Williams would do about it afterwards.

Q. Is it not a fact that on the day Williams left Hot Springs for Iditarod that the money you gave him was to be used for the mutual advantage of Mr. Williams and yourself?

A. Nothing said about that.

Q. Did you testify at the second trial of this case as follows (reads): "Q. You understood at that time, or it was in your mind, that the deal, this venture down there in which he used this money you

(Testimony of Edwin Richards.)

gave him was to be used for the mutual advantage of Mr. Williams and yourself?

A. No, sir, that was Mr. Williams' own look-out after he went down." Is that right?

A. I guess so.

Q. Sir? A. Yes, sir.

Q. Did you expect at that time that Williams was to give you something back for the use of this money?

A. If he made anything, I at least expected he would pay interest at least. It was all up to him. I am telling you I didn't stipulate with Williams to pay me anything back, no more than [197] I expected to get this money back and something for the use of it.

Q. Now, then, did you testify at the second trial (reads): "Q. But you had this understanding at the time as to both of you, as to this trip being for the mutual advantage of both of you at the time Williams left Hot Springs. Isn't that correct? A. I presume so." Was that your testimony at the last trial? A. Yes, sir.

Q. Then, that was the *understand* that you had at the time when Williams left; that that money was for the mutual advantage of both of you and to be used in that way.

A. I could not tell what would be the outcome of it. I hoped it would be to the advantage of both of us.

Q. You hoped it would be? A. Yes, sir.

Q. Now, when this letter came back from Williams advising you that he had deposited this money in the

(Testimony of Edwin Richards.)

American Bank of Alaska and had borrowed on a note signed by yourself and him the sum of \$3,500.00, did you notify the bank that that proceeding wasn't considered correct by yourself?

A. No, sir, I did not. I had nothing from the bank myself.

Q. Sir?

A. I had no notification from the bank myself.

Q. Did you notify the bank in any manner, in writing, or by word of mouth?

A. Not until January 2, 1912.

Q. That is a year and three or four months afterward?

A. When I got their first notification on December 28, 1911, I immediately wrote back denying it.

Q. I am not asking you about notification from the bank. I am asking you about the notification Williams got. You received a notification from Ed Williams at that time, which you [198] received in December, that he had gone to the bank and borrowed that money in your name.

A. I received his letter.

Q. On December 6th, 7th or 8th, 1910?

A. In December.

Q. Were you in Fairbanks during that winter, in December 1910-11? A. In Fairbanks?

Q. Yes, sir. A. What time in the winter?

Q. Any time.

A. I was not here, only in the fall, in September.

Q. I mean after December, 1910, and until April or May, 1911. A. I never was in Fairbanks.

(Testimony of Edwin Richards.)

Q. Were you in Fairbanks in the summer of 1911?

A. Yes, sir. I was in Fairbanks in September, 1911.

Q. Did you at that time notify the bank that your name had been improperly placed upon this note which they held?

A. I didn't know there was anything in the bank against me.

Q. Mr. Williams hadn't told you in the preceding December that your note was there, had he?

A. He told me that I had nothing at all in there; that I was all clear there, in April.

Q. I am talking about the testimony in this case. Did you yourself, when you came up here in December, 1911, and went into that bank to do business with them, ask them anything about that old note, or say anything to them about it?

A. No. I had no reason to say anything about it.

Q. You were in that bank of the plaintiff and doing business at that time?

A. I did business with them all that summer.

Q. You didn't ask any of the officers over there whether that matter had been straightened up?

[199] A. I didn't know anything about it.

Q. You had received eight or ten letters from Williams about it?

A. Yes, and I notified Williams immediately that I didn't stand for that proposition; I wouldn't stand for it.

Q. That is, as far as you were notified by Williams.

(Testimony of Edwin Richards.)

A. Certainly. He is the only one that told me about it.

Q. You notified him of that in December, 1910?

A. Yes, sir.

Q. And in December, 1910, you want the jury to understand that you lost all interest in this matter; is that right? You had no further interest in it; is that right?

A. After I wrote Williams and received his reply, I didn't consider that I had anything to do with it; no.

Q. In the letter of April 4, 1911, Mr. Williams told you that the note had not been paid, did he not, in a letter Williams wrote to you on April 4, 1911? (Hands letter to witness.)

A. No, sir, I can't see it.

Q. I will read it to you then (reads): "I sold the half interest in the lay just enough cash down to pay the back interest on the note \$400." A. Yes.

Q. He told you that, didn't he—just enough to pay the interest?

A. He said to pay the interest on the note.

Q. You knew that the note wasn't paid, in April, 1911, didn't you?

A. I never knew the note was renewed, sir.

Q. You testified on yesterday, did you not, that you never heard a word about the second note?

A. I never heard a word about it.

Q. You did receive this letter from Williams along about the month of May, 1911, in which he said that he had realized [200] \$400 and paid this back in-

(Testimony of Edwin Richards.)

terest on the note.

A. Yes. That is there.

Q. Then you did know in April or May of 1911, when you received this notice, Defendant's Exhibit 2, one of your own exhibits—you did know there was a note at the bank, didn't you?

A. No, sir, I did not.

Q. You didn't understand it from that letter?

A. Nor sir, I did not.

Q. You didn't understand from that what that \$400 interest meant, did you?

A. I understood it was interest on a note. Yes.

Q. On what note? A. It didn't say.

Q. And you had no mortal idea what that meant when you received it; is that right?

A. The interest on the note?

Q. You didn't know what note, though?

A. No. That was the only note I heard of.

Q. You had heard about the bank note?

A. The note of October 6th.

Q. You had heard about that note, hadn't you?

A. Yes, sir.

Q. Now, you heard about the first note that this bank had, the plaintiff in this action. A. Yes.

Q. And you said a while ago that when you wrote him in December, you considered yourself through; is that right?

A. I told him that I wouldn't stand for any notes or anything else that he might have signed my name to and let me know as soon as possible if he had revoked the same.

(Testimony of Edwin Richards.)

Q. Then on April 4, 1911, he wrote you this letter that I hold in my hand. Yes, sir. [201]

Q. And he told you he had raised enough money to pay the interest on the note.

A. That is right.

Q. And you had only heard of one note from Williams? A. Yes, sir.

Q. You must have understood from this letter that he was talking about the bank note?

Mr. PRATT.—Which bank note?

Mr. McGOWAN.—The first bank note.

Mr. PRATT.—Yes.

Mr. McGOWAN.—Which is the note in suit to-day.

Mr. PRATT.—It is not. That is a misrepresentation.

Mr. McGOWAN.—By renewal.

The COURT.—Proceed.

Mr. McGOWAN.—Q. You understood that, didn't you?

A. I understood there was a note—that first note, yes, sir.

Q. You understood by this letter of April 4, 1911, that Mr. Williams wrote about some note that the bank had?

A. I presumed it was that note.

Q. Then you did hear about this note, or this controversy between the bank and Williams and yourself in April, 1911, didn't you, and that there was a note still due, from this letter; is that right?

A. Well, according to that, yes, sir.

Q. And you came to Fairbanks in that year, within

(Testimony of Edwin Richards.)

three or four or five months after you received this letter—you must have received this letter about May—came up here and went into that bank and never mentioned that note to Hurley or Bruning or any of the officers there; is that right?

A. That same letter tells that when this deed comes back, signed and sworn to, that I would be released of all obligations. [201½]

Q. That same letter tells you that? A. Yes.

Q. That letter from Williams?

A. Yes, sir; the same letter.

Q. You didn't go to the bank when you were in there doing business and asked them, "Has Williams kept his agreement—has he released me?"

A. I don't think they asked me. I had no reason to go in there.

Q. No reason at all. You were through with the transaction? A. Why, certainly.

Q. You kept a set of books at Cache Creek in your business, did you not? A. Yes.

Q. You kept books there showing your transactions? A. Yes.

Q. Your account against Williams—Williams & Johanson—about the money they owed you in the lay, that was in your books? A. Yes, sir.

Q. That book shows how much they owed?

A. Yes, sir.

Q. You had a separate account there, too, for Williams, for some separate things that he owed you, didn't you? A. Yes, I have a personal account.

Q. You have a separate account against Williams?

(Testimony of Edwin Richards.)

A. Yes.

Q. Which shows on your books kept at Cache Creek how much Williams owes you? A. Yes, sir.

Q. About how much does he owe you?

A. I will have to see the book to see.

Q. About how much?

A. There is six hundred and some odd dollars there between the firm of Williams & Johanson.

Q. Then the private account, how much was that?

A. This money that he got to go down below.
[202]

Q. Is that on the books? A. Yes, sir.

Q. When did you put that on the books?

A. I put it down when he got it.

Q. How much did you put down?

A. There is \$2,500. Practically that, I think he got. There is \$42.00 for the man and the boat going down to Gibbon, and a little *credit* to him for some grub I had left there on Cache Creek.

Q. What is the heading of that account?

A. Williams.

Q. Williams, alone? A. Yes, sir.

Q. It doesn't say what it is for, or anything—the book doesn't? A. It shows that he got the money.

Q. You gave him \$2,500 in cash the day he left.

A. Yes, sir.

Q. You received advice of this \$3,500.00 note later from him, did you not? A. Received what?

Q. Received advice that he had signed your name to that \$3,500 note.

A. Yes, sir; I got that advice in a letter.

(Testimony of Edwin Richards.)

Q. And those two taken together, it makes \$6,000.

A. No, sir.

Q. Doesn't \$2,500 and \$3,500 make \$6,000?

A. It makes \$6,000.00. But I didn't count that in his account against him. I had nothing to do with that. That was his own business.

Q. You say in the spring of the year 1911 you had no conversation with Mr. Egler in which the following took place (reads): "We were talking about mining matter. He"—meaning you—"was mining at that time on Cache Creek, and I was mining on Tofty. And he wanted to know if I [203] didn't want to take up that proposition in the Iditarod." Did you have any conversation like that with Egler? A. No, sir. I never did.

Q. Is that the conversation that took place between Egler and yourself?

A. Not in that. No, sir, I did not.

Q. Did Egler in that same conversation ask you what it would cost, what the Iditarod proposition would cost? A. No, sir.

Q. Did you at that time say to him, "I am in about \$6,000"? A. I never did.

Q. Did you at that time say anything to Egler about a lay that you had got hold of down in the Iditarod country on Flat Creek?

A. No, I did not, that I remember. I can tell you this: That in general there were several people asked about Williams, what he was doing down there, and Egler might have asked me that, or a dozen other people, "What did Williams do down there?"

(Testimony of Edwin Richards.)

Q. You have always been very friendly with Egler? A. We are good friends.

Q. And are to-day? A. Yes, for all I know.

Q. At the present time you are partners in some mining ground in the vicinity of Hot Springs?

A. Yes, sir.

Q. No question about that?

A. No, not a thing. Mr. Egler made a proposition to me last summer himself.

Q. You had no conversation, such as he testified to in his deposition, with Mr. Egler at any time?

A. I did not. [204]

Q. When did you consider, Mr. Richards, or make up your mind in the year 1911 that Williams and yourself were through, and had nothing further to do with one another?

A. I didn't consider that I had anything to do with Mr. Williams' operations down there at any time.

Q. But you wrote him a lot of letters telling him what to do and advising him, didn't you?

A. I certainly have a right to do that.

Q. You did that? A. Yes.

Q. When did you stop losing your interest in him, and no longer advised him?

A. I never paid much attention to the proposition after I wrote him a few letters, and started at the time he got into this matter when he first got down there; after that I didn't.

Q. Sir?

A. After that I never wrote him until I got this letter, when I sent him back the deed of the property, in April.

(Testimony of Edwin Richards.)

Q. After you sent back that deed in April, did you consider that that closed all your dealings with Williams?

A. I considered that that finally closed it when he got the deed, and he should—(interrupted).

Q. You considered then that he had sold your interest, and that you were out of everything in the Iditarod; is that right? You were through?

A. I never considered myself in it at all, at no time.

Q. When you sent that deed back in April, you considered that wiped out all your connection with it.

A. I was doing that so that they could clear the thing down there, just for them; not that I considered myself in the thing at no time.

Q. You wrote, advising Mr. Williams, did you not, to be very [205] careful about his deals down there? A. I suppose I did, yes, sir.

Q. And said (reads): "Otherwise, we will be in lawsuits head over heels," didn't you?

A. I wrote him that.

Q. We will be in lawsuits head over heels?

A. I did not want to see Williams get into lawsuits, or get into any trouble whatever. If he did, he would be jeopardizing that money I gave him, and he would be up against it, and would be calling on me to pull him out.

Q. You did say to him, "We will be in lawsuits head over heels"?

A. If something would happen, yes, sir.

Q. What did you mean by "we"—Mr. Williams and yourself?

(Testimony of Edwin Richards.)

A. I meant myself. I am interested, so far as I furnished him with this money. And if Williams gets into trouble and jeopardizing this money, he is going to make a hollo and call on me to help him out.

Q. How could you get into trouble, if you had given this money to Williams and he was to use it and do with it as he pleased himself? How could you get into a lawsuit?

A. I wouldn't get into a lawsuit. It would be him that would get into a lawsuit.

Q. What?

A. I warned him not to get into anything.

Q. Did you testify at the last trial as follows (reads): "'Otherwise we will be in lawsuits head over heels.' Who did you mean by 'we'? A. Well, I suppose I was included in there." Is that your testimony? A. Yes, sir.

Q. (Reading:) "Williams and yourself. Is that what you mean? A. Yes, sir, so far as this money went. Q. By 'we' you mean Williams and yourself? A. I presume so." [206]

Q. How could you get into a lawsuit if you had given this man \$2,500 and told him to go away and not bother you any more about it and do as he pleased?

A. He could get into it, of course, in order to protect himself—this money he got would be jeopardized and he might lose it—he would come to me and hollo to me to help him out.

Q. Had he holloed to you at any time before to help him out? A. Not that I know of.

(Testimony of Edwin Richards.)

Q. And you were afraid he would hollo to you to help him out again?

A. It was natural that he would.

Q. That is what you meant when you sat down yourself and wrote a letter to Williams and told him, "We will be in lawsuits head over heels"; is that right—is that what you were thinking about?

A. In so far as he would get into any trouble with this money that I gave him.

Q. Sir?

A. So far as he would get into trouble with this particular money that I gave him.

Q. Hadn't he promised you, according to your own testimony, before he left that he would not go into any proposition down there unless the \$2,500 would carry him through? A. He did.

Q. Then, how could you be in fear of a lawsuit where "we will be in lawsuits head over heels," if he promised you that?

A. He may overlook something. He may get into something that looks clear, and there may be something behind it. [207]

Q. You say that you went to the telephone and rung up Tom Williams at Hot Springs?

A. Yes, sir.

Q. That was your telephone? A. Yes, sir.

Q. It was in the name of Richards & Williams, was it not? A. No, not then.

Q. It had been before that?

A. No. I guess it was afterwards.

(Testimony of Edwin Richards.)

Q. I am talking about just the day before Williams went away.

A. What do you mean—Tom Williams?

Q. The time you telephoned Tom Williams and asked him about that. When was that?

A. That was in the spring of 1910, I think.

Q. That was in your own house on Cache Creek? Is that right?

A. We were on Cache Creek. Yes.

Q. And this Williams here told you to go to the telephone and ring up Tom Williams and ask him about this ground.

A. I told Mr. Williams that Tom was on his way down to the Iditarod.

Q. Yes?

A. And he says, "Ask him if he will look up that proposition of Jack's down there when he gets out on the creek, on Flat Creek, on the Wildcat." I says, "All right. I will call Tom up."

Q. Yes. You testified yesterday that you did that for him, and that you had nothing to do with it.

A. For Ed Williams. Yes.

Q. You took no interest in it at all?

A. Certainly not, only he asked me to phone Tom.

Q. Why didn't you tell him to go and phone himself?

A. Because it would cost him something to use the phone.

Q. Was he working for you? [208]

A. I don't know. I think at the time. Anyway, I was talking to Tom when he asked me that.

(Testimony of Edwin Richards.)

Q. You were talking with Tom Williams.

A. Tom was at Hot Springs.

Q. You were talking with Tom Williams over the telephone? A. I think I was at the time.

Q. You discussed this matter with Mr. Aitken, did you not, over the telephone in the spring of 1911—some of the matters connected with this Iditarod affair?

A. Mr. Aitken went through Tofty there on the way up the river one day, and when I got down in the evening someone told me, if I remember right, that he had left a call or had inquired for me; that was it, I think.

Q. Yes, sir?

A. And he was at the springs that night, at Hot Springs.

Q. Did you speak to him?

A. I called the hotel on the phone, and got Tom Aitken on the phone.

Q. And you discussed this Williams proposition with Aitken, did you not?

A. I asked Aitken if he had inquired for me. He said, "Yes," if that was Richards. I said, "Yes." "Well," he says—he told me that Williams had bought an interest, I think a half interest in a lay in the Iditarod. I asked him how the camp looked, and things like that, in the ordinary way, and he told me things, and he said, "What about a note that Williams gave me, due the 1st of June"—

Q. Yes. For a boiler, wasn't it?

A. For a boiler, yes. I told him I didn't know a

(Testimony of Edwin Richards.)

thing about it; what did I know about that!

Q. Didn't you tell Aitken at that time that you had not heard [209] as yet about that?

A. I hadn't heard a word from Williams at all in the matter.

Q. You didn't tell Aitken that you didn't owe him; that he had no business to get it, did you?

A. That what?

Q. That you didn't owe that money. "Why should you telephone me about it?" You didn't tell him that, did you?

A. I was not talking that way to the man; no.

Q. He had called up and asked you to pay this note, hadn't he?

A. "How about this note?" I didn't know anything about the note he was talking about. I had nothing to do with the note.

Q. He told you it was a note for the boiler that Williams had bought in connection with the lay?

A. Yes. But what did I have to do with that?

Q. Did you tell Tom Aitken that? A. Sure!

Q. Didn't you, as a matter of fact, tell Tom Aitken that you had not heard from Williams yet, and couldn't say anything about it?

A. I says, "I have not heard a thing from Williams. I don't know a thing about it."

Q. That is what you said to him?

A. That is what I said to him, as far as I can recollect.

Q. You talked with Mr. Hurley in the winter of 1912, did you, here in Fairbanks? A. Yes, sir.

(Testimony of Edwin Richards.)

Q. And he told you that maybe that lay down there was good. Is that right?

A. Yes. He told me he thought that lay down there was still held; that some of the boys were still holding it, and he would look it up if he went down there that summer. He would go down and see if he could get something out of it. [210]

Q. He also told you that he would put the notes he claimed to have against you in the hands of his attorneys?

A. I don't remember him saying that at all.

Q. He did go down that year, did he not?

A. I seen in the papers that he went down.

Q. But he didn't take any action against you until about the 1st of September?

A. About the first of September, or August, somewhere there.

Q. And you saw him in April?

A. I saw Mr. Hurley in April. I saw him twice. The day before I left for down there, he called me in the office, and he said he was going down there and look this proposition up; that he thought that some of them that were holding that lay were still good, and he might be able to get something out of it. I said, "That is all right. That is nothing to me."

Mr. McGOWAN.—That is all.

Redirect Examination.

(By Mr. PRATT.)

Q. Mr. Richards, do I understand you to say that you were in Fairbanks in September of 1911?

A. Yes. Let's see—

(Testimony of Edwin Richards.)

Q. What? A. Wait until I memorize that.

Q. Mr. McGowan asked you here if you were here, and you said you thought you were here in the summer of 1911, and you went into the bank and didn't say anything about the note or notes. A. I know.

Q. Were you here?

A. I have got to think that over. I can't recollect if I was up here for anything or not.

Q. Williams was in the Iditarod, and gone in there the fall before? [211]

A. Let me think what I was doing that summer. I was working on Cache Creek. I have been up here so many times in the fall. To tell you the truth, I can't say for sure whether I was or not.

Q. Are you sure you were at all in 1911? You were here in September, 1910?

A. Yes, I know I was up here then.

Q. You went back and you lived there at home?

A. Yes.

Q. That winter? A. Yes.

Q. And you mined that summer there, didn't you?

A. Yes.

Q. Did you that summer come here over the water at any time?

A. No. I know that summer I went down the Yukon River when I went out. To tell you the truth right now, I can't place myself up here that fall, come to think of it. I may have too, but I will have to look up something to find out.

Q. When McGowan was examining you, you seemed to think so.

(Testimony of Edwin Richards.)

A. I took it that I was up here. I wasn't here, if I remember right. I know and realize that now.

Q. What note, in connection with this business, did you ever hear of or know anything about?

A. What was the date of it? The note of October 26th or 6th.

Q. It is October 6th. A. 6th.

Q. What year? A. 1910.

Q. You never did hear of this note of February, 24, 1911, that was sued on?

A. No, I never did hear until I got that notification in San Francisco on December 28th, and on January 2d I immediately replied and repudiated that demand for that note, for payment of that note.

Q. And you did the same thing again verbally when you were coming through here. [212]

A. The same thing here in Fairbanks personally to Mr. Hurley sometime in April.

Q. When you were being cross-examined you spoke of Egler as your partner. Do you mean that at any time you were mining copartners with him, operating mines? A. No.

Q. What are your relations with him, joint owners, co-owners, or what are they?

A. We are interested in some ground together.

The COURT.—Haven't you been over that?

Mr. PRATT.—He used the word "partners," and I want to show what he means by that.

Mr. CLARK.—We admit that he meant that they are just jointly interested in some mining property.

A. Not in working ground, but we happen to own

(Testimony of Edwin Richards.)

interests in different claims.

Mr. PRATT.—Q. When you were talking with Aitken over the phone did he give you any information as to who had signed the note he was talking about?

A. No, he didn't tell me. He said that Williams had bought a boiler, and he had a note. He didn't say it was a note from Williams or what it was.

Q. You didn't find out from him who signed that note. A. I did not. No.

Q. You found out since who signed it?

A. Williams said in that letter that he signed the note to Aitken.

Q. You heard his testimony that he signed the note himself, didn't you? A. Yes, sir.

Mr. CLARK.—We object as not proper redirect examination.

(Objection sustained.) [213]

Mr. PRATT.—That is all.

Recross-examination.

Mr. McGOWAN.—Q. After Mr. Pratt went through and explained where you were in 1911, you have made up your mind that you were not in Fairbanks in September, 1911; is that right?

A. I don't want to say for sure either way. I was going to look up and see if I have any note of any deal.

Q. You are not sure of all the testimony you gave me awhile ago on cross-examination about what happened in September, 1911, at the present time. Is that right? A. September, 1911?

(Testimony of Edwin Richards.)

Q. Yes, sir. A. Up here?

Q. Yes, sir, at Fairbanks?

A. Did I refer to any incident?

Q. You said you were here?

A. Yes, but I am not so sure whether I was or not.

Q. That is all you have to say on that subject?

A. Until I can find out for sure.

Mr. McGOWAN.—That is all.

Mr. PRATT.—That is all.

Mr. CLARK.—I would like to call Mr. Heilig at this time.

[Testimony of A. R. Heilig, for Plaintiff.]

A. R. HEILIG, a witness called in behalf of plaintiff, after being sworn, testified as follows, to wit:

Direct Examination.

(By Mr. CLARK.)

Q. Your name is A. R. Heilig? A. Yes.

Q. You are a practicing attorney, and have been for a number of years. A. Yes.

Q. Tried a good many lawsuits, and know the prevailing rates and charges and fees in such matters?

A. Yes. **[214]**

Q. This is an action instituted by the American Bank of Alaska against Mr. Richards and Mr. Williams to collect a note given in the Iditarod in February, 1911, for the sum of \$3,500. The issue is, that Mr. Richards claims that at the time the note was signed by Mr. Williams in the firm name of Richards & Williams that Mr. Williams had no authority to sign it, and that he, Richards, was not

(Testimony of A. R. Heilig.)

a partner; and he has resisted the payment of the note on that ground. The testimony has shown that there is \$1295 due as interest. This is the third trial of the case; the first trial lasting some three days, and the second trial a little longer, and this is the third day of this trial, although it has not lasted quite that long. I might also add there was an attachment levied in the first instance, when the case was instituted. From your knowledge and experience here, what would you say would be a reasonable attorney's fee for plaintiff's attorneys for instituting and prosecuting the suit to completion?

A. Including the services you have related that have been performed at the other trials?

Q. Yes.

A. A thousand dollars.

Mr. CLARK.—That is all.

Cross-examination.

Mr. PRATT.—Q. You are the general attorney for the First National Bank, and have been for some years. A. Yes.

Mr. PRATT.—That is all. [215]

[Testimony of C. J. Hurley, for Plaintiff (Recalled
—Cross-examination).]

C. J. HURLEY, recalled for further cross-examination, testified as follows, to wit:

Mr. PRATT.—Q. I will ask you to state if, at the second trial, you didn't give this testimony (reads):

“Q. State, as near as you can, what the conversation was at that time.— A. He stated that the money

(Testimony of C. J. Hurley.)

that he had deposited was Dick Richards', and that Richards had sent him down there to buy interests or get into something if he could, and that they were to be partners, and that he wanted to keep a record of the money such that he could account to Richards for the money; and he asked my advice how to open the account and how to keep it." I will ask you to state if you didn't give that answer at the second trial. A. Yes, sir.

Mr. PRATT.—That is all.

Mr. McGOWAN.—That is all.

Mr. MARQUAM.—Is it admitted that there has been no default entered against Mr. Williams?

Mr. McGOWAN.—There is no default entered against Mr. Williams. We never had a formal default entered.

Mr. MARQUAM.—That is what I want.

Mr. CLARK.—In order to straighten this matter out, I ask that default be entered against Williams, he having been served in the month of September, 1912, at the town of Tofty, on the 5th day of September, 1912, and no answer or appearance having been filed on behalf of Mr. Edward Williams, we ask that his default be entered.

Mr. MARQUAM.—All we want to show is that up to the present time, they have never entered a default against Mr. Williams. It is admitted that no default has ever been entered against Mr. Williams up to this time?

Mr. CLARK.—Yes.

Mr. PRATT.—We rest.

Defendant Richards rests. [216]

[**Testimony of C. J. Hurley, for Plaintiff (in Rebuttal).**]

C. J. HURLEY, called as witness for plaintiff in rebuttal, heretofore sworn, testified as follows:

Direct Examination.

(By Mr. McGOWAN.)

Q. Tell us the conversation that you had with Richards that he related as having taken place in the spring of 1912.

Mr. MARQUAM.—Which one? Where?

Mr. McGOWAN.—That he related on the witness-stand; at Fairbanks in the bank.

A. My conversation with Richards was in the private office in the American Bank over there, and he repudiated the note, saying he was not responsible, and wouldn't pay it. And I told him at the time this; that if that was his final decision in the matter, I would have to turn it over to our attorneys for suit and collection.

Q. At that time did you have the note?

A. Yes, sir.

Q. And that is the note in suit in this action, is it not? A. Yes.

Q. That was in what month?

A. In the spring of 1912. I couldn't say as to the time. It was just after he came in over the trail.

Q. Go on with the rest of the conversation.

A. That was decided upon at that time, that I would bring the suit in this court.

Q. Yes, sir?

A. Then, afterwards, I told Mr. Richards that I

(Testimony of C. J. Hurley.)

was going down to Iditarod—a few days later—and I wasn't sure about the lay down there having been abandoned, but I felt quite certain that it was. However, I would look the matter up when I got down there, and, if there was a chance to realize [217] anything out of it, on account of the Guggenheims going in there and buying the lay, that I would use my best efforts to do so; and, in case I accomplished anything, I would let him know.

Q. What did you find when you got there?

A. The lay had been abandoned in the fall of 1911, and forfeited back to the owners.

Q. Then you refrained from commencing action until you got back in August. A. Yes.

Q. Or September. A. Yes, sir.

Mr. McGOWAN.—That is all.

Mr. PRATT.—That is all.

Mr. McGOWAN.—That is our case. We rest.

Testimony closed. [218]

The above and foregoing contains all the evidence, oral and written, that was introduced and heard at the trial of the case.

At the close of the testimony, the case was argued by the attorneys for plaintiff and the attorneys for answering defendant Richards, whereupon the Court instructed the jury orally as follows, the same being all the instructions given the jury by the Court: [219]

[Caption and Title.]

Instructions [of Court to Jury].

Gentlemen of the Jury:

In this action, in the complaint plaintiff alleges that it is incorporated under the laws of the State of Washington, and that it is doing business in this division of Alaska; and that the defendants Edward Williams and Edwin Richards compose a mining copartnership engaged in business under the firm name and style of Richards & Williams. That in or about the month of September, 1910, plaintiff loaned the defendants a sum in excess of thirty-five hundred dollars, and thereafter, on or about February 24, 1911, defendants, in consideration of the moneys theretofore loaned them by the plaintiff, made, executed and delivered to the plaintiff a promissory note payable on or before July 1, 1911, with interest at the rate of 12 per cent per annum until paid, and also providing that in case action should be brought to collect the note that the defendants would pay such additional sum as attorneys' fees as the court might adjudge reasonable. The plaintiff also alleges that the note is past due, and that no part thereof has been paid, and that a reasonable sum to be allowed it as attorney's fee is seven hundred and fifty dollars; that a second cause of action, upon an overdraft, contained in the complaint has been dismissed, and which you will not consider. [220]

This complaint the defendant Richards has answered, admitting the incorporation of the plaintiff, but denying each and every other allegation con-

tained in the Complaint.

The defendant Williams has not answered. And the only issues, therefore, to be determined by you are those between the plaintiff and the defendant Richards.

In a civil case it is incumbent upon the plaintiff to prove by a preponderance of evidence each and every material allegation of its complaint which has been denied by the defendant.

On the part of the plaintiff it is contended that in the latter part of September, 1910, in the Hot Springs Precinct, in this division, the defendants Williams and Richards entered into an agreement of partnership whereby Richards agreed to advance a certain amount of money for the use of such partnership, and the defendant Williams agreed to proceed to the Iditarod and to investigate conditions there, and that it was also agreed between them that if it should seem advisable to said Williams, after arriving in Iditarod and after such investigation, that he should purchase an interest in a certain lay or lease upon a mining claim on Flat Creek. It is further contended by the plaintiff that Williams did proceed to Iditarod pursuant to such agreement and did purchase for said partnership an interest in the lay or lease on Flat Creek, and, for the purpose of making such purchase, did borrow the sum of thirty-five hundred dollars from plaintiff, and, on or about October 6, 1910, made and delivered to plaintiff a promissory note therefor, signed by Williams in the name of Williams & Richards.

Plaintiff further contends that Richards was in-

formed by Williams of this transaction, and that he ratified the same, and that thereafter on or about the 24th day of February, 1911, the defendant Williams executed to the plaintiff the note which has [221] been introduced in evidence, bearing date on that day, and that the same was given for the money theretofore loaned, and in renewal of the note made on or about October 6, 1910, and that this note was executed as the note of Williams & Richards, and that Williams was authorized to execute such note on behalf of the defendant Richards.

On the part of the defendant Richards it is contended that he never entered into any partnership agreement of any kind with Williams, and never authorized him to borrow any sum of money, and that he never ratified any of the acts of Williams in borrowing money from the plaintiff, and that Williams was without authority to execute on behalf of Richards either the note of October 6, 1910, or the one of February 24, 1911.

You should consider, therefore, whether or not the defendants Williams and Richards entered into any partnership agreement as alleged by the plaintiff, and whether or not, if you find that they did enter into such agreement, it was contemplated thereby that the said Williams should have authority to borrow money for the purposes of such partnership, and whether or not the moneys borrowed by him from the plaintiff were for such purposes, if you find that a partnership had been formed theretofore between Williams and Richards.

And you are instructed that if you find from the

evidence in this action that such partnership was formed with the defendants, and that it was contemplated thereby that Williams should have authority to borrow money for the partnership use, and that such sum of money was borrowed from the plaintiff by Williams for such partnership purpose, and the notes above mentioned given to plaintiff therefor, then your verdict should be for the plaintiff. [222]

A mining partnership exists where two or more persons co-operate in working mining property. Mere ownership as tenants in common, either in the mining ground itself or of a leasehold interest thereon, is not sufficient to constitute a mining partnership.

Where such copartnership is shown to exist, each partner has power to bind his copartner by dealings on credit and the giving of promissory notes for the purpose of working the mine where it appears to be necessary or usual in the management of the business; but one such copartner has no implied power or authority to borrow money and sign the firm name to a promissory note as evidence of such loan where the money is to be, and is, used in purchasing mining ground or interests, or assignments of leases, by reason of the mining partnership relations; and, if he does so without the knowledge or consent of his copartners, they are not liable thereon by reason of the copartnership relation.

In case you should find that such copartnership was not formed between the defendants, or that Williams was not authorized to borrow money for partnership purposes, or that the money loaned by the plaintiff was not for partnership purposes, then you

should consider whether or not the defendant Richards was informed of the transactions between Williams and the plaintiff, and whether or not the defendant Richards, after having been fully informed of such transactions, ratified the same.

You are instructed that if you find that the defendant Richards was fully informed of the transactions between the plaintiff and Williams, and that said sum of money was loaned by the plaintiff to Williams, for the use of Williams & Richards, and that on or about October 6, 1910, the defendant Williams executed the note to the plaintiff for said sum of money and signed thereto the name of Richards or the firm name of Williams & Richards, and that [223] Richards, having been fully informed of these transactions, ratified the same, that then such ratification of the acts of Williams by Richards would have the same effect as if authority to perform such acts had previously been given by Richards to Williams. And, if you find that said acts of Williams were so ratified by Richards, then your verdict should be for the plaintiff, provided you also find that the note in issue was given as a renewal of the note of October 6, 1910, and in consideration of the loan originally made.

You are instructed that to constitute a copartnership it is not necessary that there be any formal written agreement between the parties.

You are instructed that if you find from the evidence in this case that subsequent to the time when Williams borrowed from the plaintiff herein the monies for the recovery of which this action was brought, he communicated fully such facts to the de-

fendant Richards, and informed him that the said monies so borrowed in the name of Richards & Williams were to be used in their joint enterprise, and that said Richards did not, on receipt of such information and within a reasonable time, notify the plaintiff in this action that he was not a partner of defendant Williams, or repudiate the acts of Williams, that such failure to so notify the plaintiff may be considered by you as evidence of ratification of the acts of Williams by Richards.

You are instructed that it was not necessary for Williams to have authority to bind Richards in the giving of the note sued on in this action before the execution of the same, provided you find that Richards thereafter ratified the acts of Williams.

And you are further instructed that such ratification need not be expressed in writing. But his failure to disaffirm the acts [224] of Williams within a reasonable time, or to repudiate the actions of Williams and notify the plaintiff thereof in this action within a reasonable time, may be held to constitute a ratification of the acts of defendant Williams so that the defendant Richards will then become liable for such indebtedness. Of course, an act of ratification, either by failure to protest, or by express affirmative acts, implies that the party had full knowledge of such acts as had been done by his agent; and, unless he had such knowledge, he would not be held to have ratified them by any failure to act or disaffirm them. Ratification means a confirmation of an act previously done by another.

You are instructed that the mere declaration or representation of one person that another is his min-

ing partner, or that he is that other's agent with authority to sign promissory notes by reason of such copartnership, not made in the presence of such other party, is not evidence of a mining copartnership or agency as against such other person to be bound thereby.

You are instructed that no authority in writing is necessary to authorize another to sign his name to a note, provided the authority is given in some way, or provided the acts of the party so signing another's name to the note are ratified by that other afterwards with full knowledge of what has been done.

And in this case if the note was signed in the name of Richards & Williams with the intention on the part of Williams to bind both parties, and he either had such authority from Richards beforehand, or if Richards, with full knowledge of what had been done, ratified such act afterwards either by affirming the same or by failing to notify the payee of the note that the same was signed without his authority, within a reasonable time, then he may be held to have been bound in the same manner as if such authority had been given in writing beforehand. [225]

You are the sole judges of all questions of fact, and of the effect of the evidence, and the weight to be given to the testimony of witnesses. But your power in this respect is not arbitrary, and is to be exercised by you with legal discretion and in subordination to the rules of evidence as given to you in these instructions.

In determining the credit you will give to a witness, and the weight and value you will attach to his testimony, you should take into account his conduct

and appearance upon the witness-stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; and his relations to, or feeling for or against any of the parties to the action; the probability or improbability of his statements; and the opportunity he had to observe and to be informed as to matters respecting which he has given testimony before you; and the inclination he evinces in your judgment to speak the truth, or otherwise, as to matters within his knowledge.

It is your duty to give to the testimony of each and all of the *witness* appearing before you such credit as you consider the same justly entitled to receive.

In this connection you are instructed that evidence is to be estimated, not only by its intrinsic weight, but also according to the evidence which it is within the power of one side to produce, and of the other to contradict. And, therefore, if the weaker and less satisfactory evidence has been offered, when it appears that stronger and more satisfactory evidence was within the power of the party offering the same, then the evidence so offered should be viewed with distrust.

You should consider no evidence sought to be introduced, but excluded by the Court, nor should you consider any evidence stricken out by the Court, nor should you take into consideration [226] in making up your verdict any knowledge or information known to you not derived from the evidence given by the witnesses on the witness-stand, or legally deducible therefrom.

Whatever verdict is warranted by the evidence, under the instructions of the Court, you should re-

turn, as you have sworn so to do.

You are not bound to find a verdict in conformity with the declarations or testimony of any number of witnesses when the evidence does not produce conviction in your minds, as against a lesser number of witnesses, or against a presumption or other evidence which is satisfying to your minds.

You are also instructed that a witness wilfully false in one part of his testimony **may** be distrusted in other parts of his testimony.

There is some evidence in this case as to oral admissions by the parties to the cause, and you are instructed that, owing to the infirmity of the human mind, and the inability of a witness to repeat the exact language used by a person alleged to have made such oral admissions, and to understand it correctly, and to repeat it with all its intended meaning, you are to view the evidence as to such oral admissions with caution. But, if you shall find and believe that such oral admissions were actually made by the person alleged to have made them, you should consider them as candidly and fairly as other evidence in the case, and give them weight accordingly.

If you find that any actual notice was received by the plaintiff from the defendant Richards that he was not a copartner, or would not be bound by what had been done, the manner in which it was communicated to the plaintiff would not be material, whether it came directly or indirectly. [227]

Two forms of verdict will be handed to you; one finding for the plaintiff for the amount of the note and interest, and also such attorney's fee as may be found by you, the other finding for the defendant; which-

ever one you unanimously agree upon you will sign by your foreman and return into court. You will take with you the pleadings, and such exhibits as were admitted in evidence.

Given March 26, 1914.

Whereupon, in the presence of the jury and before the jury retired for deliberation, the answering defendant excepted to portions of the oral charge given by the court to the jury as follows: [228]

[Exceptions of Edwin Richards to Instructions of Court to Jury.]

[Caption and Title.]

The answering defendant Edwin Richards excepts to portions of the charge of the Court to the jury as follows:

I.

Answering defendant excepts to that part of the charge wherein the Court assumed to state the issues tendered by the plaintiff, and its contention in connection therewith, as follows:

“On the part of the plaintiff it is contended that in the latter part of September, 1910, in the Hot Springs Precinct in this division, the defendants Williams and Richards entered into an agreement of partnership whereby Richards agreed to advance a certain amount of money for the use of such partnership, and the defendant Williams agreed to proceed to the Iditarod and to investigate conditions there, and that it was also agreed between them that if it should

seem advisable to said Williams, after arriving in Iditarod and after such investigation, that he should purchase an interest in a certain lay or lease upon a mining claim on Flat Creek. It is further contended by the plaintiff that Williams did proceed to Iditarod pursuant to such agreement and did purchase for said partnership an interest in the lay or lease on Flat Creek, and, for the purpose of making such purchase, did borrow the sum of thirty-five hundred dollars from plaintiff, and, on or about October 6, 1910, made and delivered to plaintiff a promissory note therefor, signed by Williams in the name of Williams & Richards.

Plaintiff further contends that Richards was informed by Williams of this transaction and that he ratified the same, and that thereafter on or about the 24th day of February, 1911, the defendant Williams executed to the plaintiff the note which has been introduced in evidence, bearing date on that day, and that the same was given for the money theretofore loaned, and in renewal of the note made on or about October 6, 1910, and that this note was executed as the note of Williams & Richards, and that Williams was authorized to execute such note on behalf of the defendant Richards."

for the reason that the same is inaccurate, and no such claim was [229] made or advanced by the plaintiff; that no amount of money was mentioned as between the answering defendant and Edward Williams other than the twenty-five hundred dollars,

and there was nothing said between either of them about borrowing more money for any purpose from any bank or anybody else, as indicated by said opening statement. And the same is further misleading for the reason that it confuses the note of October 6, 1910, with the one of February 24, 1911 upon which this action is based.

II.

The answering defendant excepts to that part of the charge which reads as follows:

“You should consider, therefore, whether or not the defendants Williams and Richards entered into any partnership agreement as alleged by the plaintiff, and whether or not, if you find that they did enter into such agreement, it was contemplated thereby that the said Williams should have authority to borrow money for the purposes of such partnership, and whether or not the monies borrowed by him from the plaintiff were for such purposes, if you find that a partnership had been formed theretofore between Williams and Richards.”

for the following reasons: That the same is misleading in that it refers to a general partnership between Williams and Richards instead of a mining copartnership as set forth in the plaintiff's complaint; and for the further reason that it is not based upon any evidence in the case, and especially that part of it that authorizes the jury to inquire whether any agreement between them contemplated the borrowing of money for partnership purposes, and whether or not monies borrowed from the plaintiff were used for such purposes.

III.

Said answering defendant excepts to that part of the charge which reads:

“You are instructed that if you find from the evidence in this action that such partnership was formed with the defendants, and that it was contemplated thereby that Williams should have authority to borrow money from the partnership use, and that such sum of money was borrowed from the plaintiff by Williams for such partnership purpose, and the notes above mentioned given to plaintiff therefor; then your verdict should be for the plaintiff,” [230]

for the reason that the same is misleading, and not based on any issue tendered by the complaint or any evidence introduced upon the trial.

IV.

Said answering defendant excepts to that part of the charge which reads:

“In case you should find that such copartnership was not formed between the defendants, or that Williams was not authorized to borrow money for partnership purposes, or that the money loaned by the plaintiff was not for partnership purposes, then you should consider whether or not the defendant Richards was informed of the transactions between Williams and the plaintiff, and whether or not the defendant Richards, after having been fully informed of such transactions, ratified the same.

You are instructed that if you find that the defendant Richards was fully informed of the

transactions between the plaintiff and Williams, and that said sum of money was loaned by the plaintiff to Williams for the use of Williams & Richards, and that on or about October 6, 1910, the defendant Williams executed the note to the plaintiff for said sum of money and signed there-to the name of Richards or the firm name of Williams & Richards, and that Richards, having been fully informed of these transactions, ratified the same, that then such ratification of the acts of Williams by Richards would have the same effect as if authority to perform such acts had previously been given by Richards to Williams. And, if you find that said acts of Williams were so ratified by Richards, then your verdict should be for the plaintiff, provided you also find that the note in issue was given as a renewal of the note of October 6, 1910, and in consideration of the loan originally made."

for the reason that the same is misleading, is not based upon any issues made by the pleadings in the case, is not applicable to any theory of the case made by the pleadings, and is not based upon any evidence introduced or heard at the trial.

V.

The answering defendant excepts to that part of the charge which reads:

"You are instructed that if you find from the evidence in this case that subsequent to the time when Williams borrowed from the plaintiff herein the monies for the recovery of which this action was brought, he communicated fully such

facts to the defendant Richards, and informed him that the said monies so borrowed in the name of Richards & Williams were to be used in their joint enterprise, and that said Richards did [231] not, on receipt of such information within a reasonable time notify the plaintiff in this action that he was not a partner of defendant Williams, or repudiated the acts of Williams, that such failure to so notify the plaintiff may be considered by you as evidence of ratification of the acts of Williams by Richards.”

for the reason that the Court here singles out a vein of evidence and tells the jury that they may consider the same as an act of ratification, casting a duty upon Richards to notify the bank of his repudiation of Williams’ actions in signing his name to the paper, whereas in law it was not his duty to notify the bank, but the bank’s duty to notify him of Williams’ act in signing his name to the note in suit, and thus give him the opportunity to affirm or disaffirm the conduct of Williams.

VI.

The answering defendant excepts to that part of the charge given in this language:

“You are instructed that it was not necessary for Williams to have authority to bind Richards in the giving of the note sued on in this action before the execution of the same, provided you find that Richards thereafter ratified the acts of Williams.

And you are further instructed that such ratification need not be expressed in writing. But

his failure to disaffirm the acts of Williams within a reasonable time, or to repudiate the actions of Williams and notify the plaintiff thereof in this action within a reasonable time, may be held to constitute a ratification of the acts of defendant Williams so that the defendant Richards will then become liable for such indebtedness. Of course, an act of ratification, either by failure to protest, or by express affirmative acts, implies that the party had full knowledge of such acts as had been done by his agent; and, unless he had such knowledge, he would not be held to have ratified them by any failure to act or disaffirm them. Ratification means a confirmation of an act previously done by another."

for the reason that the Court here instructs the jury upon a theory of the case not developed by the pleadings or made by the issues in the case, and singles out a vein of supposed evidence and declares the force and effect that the jury should give thereto and instructs them with reference to something that was not disclosed by any evidence in the case. [232]

VII.

The answering defendant excepts to that part of the charge which reads:

"You are instructed that no authority in writing is necessary to authorize another to sign his name to a note, provided the authority is given in some way, or provided the acts of the party so signing another's name to the note are ratified by that other afterwards with full knowledge of

what has been done. And in this case if the note was signed in the name of Richards & Williams with the intention on the part of Williams to bind both parties, and he either had such authority from Richards beforehand, or if Richards, with full knowledge of what had been done, ratified such act afterwards either by affirming the same or by failing to notify the payee of the note that the same was signed without his authority, within a reasonable time, then he may be held to have been bound in the same manner as if such authority had been given in writing beforehand."

for the reason that the same is not within any of the issues made by the pleadings, is upon an entirely different theory from the one tendered by the plaintiff in his complaint, is not based upon any evidence introduced by either party, and is misleading.

Taken by the answering defendant Edwin Richards in open court in the presence of the jury and after the instructions had been read to the jury on the 26th day of March, 1914.

F. E. FULLER,
District Judge. [233]

[Special Instructions Requested by Defendant Richards.]

Special Instructions No. 2 Requested by Answering Defendant Richards:

II.

The Court instructs the jury that a mining partnership can only exist where several parties co-

operate in working mining property; mere ownership as tenants in common, either of the mining ground itself or a leasehold thereon, not being sufficient.

Where a mining copartnership is shown to exist within the definition above given, each partner has power to bind his copartners by dealing on credit and the giving of promissory notes for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; but one mining copartner has no implied power or authority to borrow money and sign the firm name to a promissory note as evidence of such loan, where the money is to be and is used in purchasing mining ground or interests therein or assignments of leases thereon, and if he does so without the knowledge or consent of his copartners, they are not liable thereon.

Modified and given.

Applying the law as given above to the testimony in this case, I charge you that if you find from the testimony that no mining copartnership existed between the defendants Edward Williams and Edwin Richards on the 24th day of February, 1911, the date of the note which is the subject of this action; or if you find that they were on and before said day such copartners, but that the money evidenced by the said promissory note was, on or before that date and without the knowledge or consent of the defendant Edwin Richards, borrowed by the defendant Edward Williams from the plaintiff bank for the purpose of being used in the purchase of an interest in a lease on Flat Creek in the Iditarod country, and that said money

was so used, then in either event the defendant Edwin Richards is not liable upon the said [234] note, unless afterwards, with full knowledge of all the material facts connected therewith, he ratified the making and signing of the said note by the said Edward Williams.

The word "ratification" means a confirmation of a previous act done by another.

Refused.

Special Instruction No. 3, Asked by Defendant Richards.

III.

The Court instructs the jury that the naked declaration or representation of one person that another person is his mining partner, or that he is that other's agent with authority to sign promissory notes by reason of such copartnership, is not evidence of a mining copartnership or agency, as against such other person.

Modified and Given.

Applying the foregoing rule of law to the testimony in this case, if you find therefrom that on or about the 6th day of October, 1910, at Iditarod City and at the time the note of that date for \$3,500.00 was signed by the defendant Edward Williams in the name of "Richards & Williams" as shown by Plaintiff's Exhibit "5," the said Williams declared and represented to C. J. Hurley, manager of the plaintiff bank, that he and the defendant Edwin Richards were mining copartners, and for that reason he was authorized to borrow money and sign the firm name "Richards & Williams" to a promissory note for the

amount of money so borrowed, then I charge you that, under such circumstances, the said Hurley, acting for said bank, had no legal right to rely solely on such declaration or representation, and if he did so it was at the peril and risk of the plaintiff bank. Under the conditions stated above, it would have been the duty of the officers of the bank to make other and independent inquiries as to the truth of the statements made by Williams; and, if you find from the evidence that the said officers failed to make such inquiries, and that Williams was not at the time a mining copartner with Richards [235] and was not authorized to sign the note, the bank must bear the loss, if any, and not the defendant Edwin Richards.

Refused.

The Court further instructs the jury that all that is said above with reference to the note, Plaintiff's Exhibit "5," applies with equal force to the note, Plaintiff's Exhibit "6," made the basis of this action and copied in the body of the complaint, so far as the liability of the defendant Edwin Richards is concerned, growing out of the signature thereon "Richards & Williams."

The note in action (Plaintiff's Exhibit "6") is also signed by individual names as follows: "Edward Williams, Edwin Richards by Edward Williams, his attorney in fact." With reference to such signatures, you are instructed that as the name of the defendant Edwin Richards purports on the face of the note in action to have been signed by Edward Williams under the authority of a power of attorney, but the evidence conclusively shows that he had no power

of attorney or other written authority to sign said note for defendant Richards, it follows that the plaintiff cannot recover against said Richards by reason of such individual signatures unless you should further find from a preponderance of the evidence that the defendant Edwin Richards, after full knowledge of all the material facts connected with the signing of said note, ratified the action of the said Edwin Williams in the execution and delivery thereof.

Refused.

Special Instruction No. 4 Asked by Defendant Richards.

IV.

Where a promissory note is signed by one person for another as that other's attorney in fact, as the note copied in the complaint was, the one taking such note is put on his guard by the form of the signature and is bound to inquire whether the person so assuming to sign for such other in fact held a power of attorney or other written authority to so act, and if it turn out that he did not have such written authority the note is void [236] as against such other.

Refused.

Applying the foregoing rule of law to the testimony in this case, if you find from the evidence that the defendant Williams on February 24, 1911, did not have a power of attorney or other written authority from the defendant Richards authorizing him to sign the name of the defendant Richards to promissory notes, then the action of the said Williams in signing the note copied in the complaint was ineffectual to bind Richards and he would not be liable for the pay-

ment thereof, unless you should further find from a preponderance of the evidence that, after being fully informed of all the facts in the premises, he ratified the action of Williams in signing his name to the said note.

Refused. [237]

And the Court having refused to give to the jury the said special instructions numbered 2, 3, and 4, as requested by said answering defendant Richards, the said answering defendant in the presence of, and before the retirement of, the jury, excepted to the said refusal of the Court, in manner following: [238]

[Caption and Title.]

**Exceptions to the Refusal to Give and Modification
of Special Instructions Tendered by the
Defendant Edwin Richards.**

The answering defendant Edwin Richards excepts to the action of the Court in refusing to give special instructions tendered by him and modifying others asked by him at the last trial of this action which occurred on March 24th, 25th, 26th, 1914, said special instructions being on file with the papers in this cause, to wit:

I.

The said defendant excepts to the refusal of the Court to give and read to the jury his special instruction #1 as to the effect of the notice to the bank through Williams of Richards' disaffirmance and dissatisfaction with Williams' action in signing his name to the note made the subject of this lawsuit. [239]

II.

The answering defendant excepts to the action of the Court in modifying his exception #2 in this, that the Court did read to the jury the opening paragraph thereof which is an abstract statement of the law in reference to what constitutes mining copartnership and the powers and authorities of individual members thereof, but did not read to the jury and omitted the balance of the said instruction which is an application of said abstract law to the testimony.

III.

The answering defendant excepts to the action of the Court in relation to his special instruction #3 in this, that the Court did read to the jury the opening paragraph thereof which is a mere abstract statement in regard to the declaration of one person that another is his partner or principal, but omitted to read and withheld from the jury the balance of the said instruction which applies the said abstract principle of law to the evidence in the case.

IV.

The answering defendant excepts to the action of the Court in refusing his instruction #4 on the subject of the authority to sign a promissory note by one who assumes to act as an "attorney in fact" and the duty that that casts upon the one taking that paper to inquire into such authority, there being nothing similar thereto or covering the same ground in the general charge.

V.

The answering defendant excepts to the refusal of the Court to give his special instruction #5 on the

subject of a release of the answering defendant by the bank, the same being within the proofs of the case and nothing of like nature having been given in the general charge. [240]

VI.

The answering defendant excepts to the action of the Court in refusing to give his special instruction #6 on the subject of mining copartnerships and the implied authority of members in the matter of executing partnership obligations, nothing of like import having been given by the Court in its general charge.

The foregoing exceptions were taken by the answering defendant Edwin Richards in open court in the presence of the jury after the general charge of the Court had been read to the jury on the 26th day of March, 1914.

F. E. FULLER,
District Judge. [241]

[Caption and Title.]

Motion for New Trial.

The answering defendant Edwin Richards moves the Court for an order setting aside the verdict of the jury in this case, and granting him a new trial, for the following reasons:

First: For errors of law occurring at the trial, and excepted to by him at the time.

- (a) In excluding from evidence the letters of Edward Williams to himself, the mining contract between John Boulton, Edward Williams, Angus McKenzie and Angus McLennan of date February 25, 1911, and this answering defend-

ant's letter of January 2, 1912, addressed to the plaintiff bank, which are marked respectively Defendant's Exhibits 3, 4, 5 and 6 for identification;

(b) In misdirecting the jury as to the law of the case, as particularly pointed out in the written exceptions thereto filed in the case, which said exceptions are made a part of this motion;

(c) In failing and refusing to give and read to the jury special instructions tendered by the answering defendant, as the same are now on file with the papers in the case and numbered from 1 to 6, inclusive.

Second: For the reason that said verdict is contrary to law. [242]

Third: Because said verdict is not sustained by sufficient evidence, and is contrary to the evidence.

LOUIS K. PRATT & SON, and
T. A. MARQUAM,

Attorneys for Answering Defendant Edwin Richards. [243]

[Caption and Title.]

Certificate to Bill of Exceptions.

United States of America,
Territory of Alaska,—ss.

I hereby certify that the above and foregoing contains a full, true and accurate transcript of all the oral testimony and documentary evidence introduced at the trial of the above-entitled action upon the issues joined as between the plaintiff and the answering defendant Edwin Richards, as well as the com-

plete oral charge of the Court to the jury; that it includes all exceptions taken throughout the trial to the admission and rejection of evidence, also the exceptions taken to the instructions of the Court to the jury, the exceptions to the refusal of the Court to give the special instructions tendered by the said answering defendant and numbered 2, 3 and 4, the motion for a new trial, and all other matters and things occurring thereat and not otherwise of record.

And I now sign, seal and allow the same as and for a true and correct bill of exceptions of all matters contained therein, and order the same to be refiled by the clerk of this court, and, when so refiled, to be and become part of the record in this cause.

Dated at Fairbanks, Alaska, this 27th day of May, A. D. 1914.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 12, page 933. [244]

Service of the foregoing proposed Bill of Exceptions and receipt of copy thereof acknowledged this 11th day of May, 1914, 8:30 P. M.

McGOWAN & CLARK.

No. 1815. District Court, Fourth Judicial Division, Territory of Alaska. American Bank of Alaska, a Corporation, vs. Edward Williams and Edwin Richards, Mining Copartners Engaged in Business Under the Firm Name and Style of Richards & Williams, and Richards & Williams, a mining Copartnership. Bill of Exceptions. Received Clerk of the Court Office, May 12, 1914. Fairbanks, Alaska. Refiled in the District Court, Territory of

Alaska, 4th Div. May 27, 1914. Angus McBride,
Clerk. [245]

[Minutes of Court, May 27, 1914.]

[Caption and Title.]

Order Settling and Allowing Bill of Exceptions.

Now on this day, the Bill of Exceptions herein being presented in open court by Louis K. Pratt, attorney for defendants, Thos. A. McGowan appearing in behalf of plaintiff; and upon due consideration thereof,

IT IS ORDERED that said Bill of Exceptions be, and the same is hereby settled and allowed. [246]

[Caption and Title.]

Assignment of Errors.

The above-named Edwin Richards, answering defendant in the said cause and plaintiff in error, will rely for the reversal of the judgment herein by the United States Circuit Court of Appeals for the Ninth Circuit, on the following errors committed by the trial Court as shown by the record:

I.

For the error of the trial Court in instructing the jury orally, on its own motion in the following language:

“On the part of the plaintiff it is contended that in the latter part of September, 1910, in the Hot Springs Precinct in this division, the defendants Williams and Richards entered into an agreement of partnership whereby Richards

agreed to advance a certain amount of money for the use of such partnership, and the defendant Williams agreed to proceed to the Iditarod and to investigate conditions there and that it was also agreed between them that if it should seem advisable to said Williams, after arriving in Iditarod and after such investigation, that he should purchase an interest in a certain lay or lease upon a mining claim on Flat Creek. It is further contended by the plaintiff that Williams did proceed to Iditarod, pursuant to such agreement, and did purchase for said partnership an interest in a lay or lease on Flat Creek, and, for the purpose of making such purchase, did borrow the sum of thirty-five hundred dollars from plaintiff, and, on or about October 6, 1910, made and delivered to plaintiff a promissory note therefor, signed by Williams in the name of Williams & Richards.

Plaintiff further contends that Richards was informed [247] by Williams of this transaction, and that he ratified the same, and that thereafter on or about the 24th day of February, 1911, the defendant Williams executed to the plaintiff the note which has been introduced in evidence, bearing date on that day, and that the same was given for the money theretofore loaned, and in renewal of the note made on or about October 6, 1910, and that this note was executed as the note of Williams & Richards, and that Williams was authorized to execute such note on behalf of the defendant Richards." for the reason that the same is inaccurate, and no

such claim was made or advanced by the plaintiff; that no amount of money was mentioned as between the answering defendant and Edward Williams other than the twenty-five thousand dollars advanced by Richards to Williams at Hot Springs, and there was nothing said between them about borrowing more money at Iditarod City for any purpose from any bank or anybody else, as indicated by said opening statement. And the same is further misleading, for the reason that it confuses the note of October 6, 1910, with the one of February 24, 1911, upon which this action is based.

II.

For the error of the Court in instructing the jury orally, on its own motion, in the following language:

“You should consider, therefore, whether or not the defendants Williams and Richards entered into any partnership agreement as alleged by the plaintiff, and whether or not, if you find that they did enter into such agreement, it was contemplated thereby that the said Williams should have authority to borrow money for the purposes of such partnership, and whether or not the monies borrowed by him from the plaintiff were for such purposes, if you find that a partnership had been formed theretofore between Williams and Richards.”

for the reason that the same is misleading in that it refers to a general copartnership between Williams and Richards instead of a mining copartnership as set forth in the plaintiff's complaint; and for the further reason that it is not based upon any evidence in the case, and especially that part of it that author-

izes the jury to inquire whether any agreement between them contemplated the borrowing of money for partnership purposes, and whether or not monies borrowed from the plaintiff were used for such purposes. [248]

III.

For the error of the Court in instructing the jury orally, on its own motion, in the following language:

“You are instructed that if you find from the evidence in this action that such partnership was formed with the defendants, and that it was contemplated thereby that Williams should have authority to borrow money for the partnership use, and that such sum of money was borrowed from the plaintiff by Williams for such partnership purposes, and the notes above mentioned given to plaintiff therefor, then your verdict should be for the plaintiff.”

for the reason that the same is misleading, and not based on any issue tendered by the complaint or any evidence introduced upon the trial.

IV.

For error of the Court in instructing the jury orally, on its own motion, as follows:

“In case you should find that such copartnership was not formed between the defendants, or that Williams was not authorized to borrow money for partnership purposes, or that the money loaned by the plaintiff was not for partnership purposes, then you should consider whether or not the defendant Richards was informed of the transactions between Williams and the plaintiff, and whether or not the defend-

ant Richards, after having been fully informed of such transactions, ratified the same.

You are instructed that if you find that the defendant Richards was fully informed of the transactions between the plaintiff and Williams, and that said sum of money was loaned by the plaintiff to Williams for the use of Williams & Richards, and that on or about October 6, 1910, the defendant Williams executed the note to the plaintiff for said sum of money and signed thereto the name of Richards, or the firm name of Williams & Richards, and that Richards, having been fully informed of these transactions, ratified the same, that then such ratification of the acts of Williams by Richards would have the same effect as if authority to perform such acts had previously been given by Richards to Williams. And, if you find that said acts of Williams were so ratified by Richards, then your verdict should be for the plaintiff, provided you also find that the note in issue was given as a renewal of the note of October 6, 1910, and in consideration of the loan originally made."

for the reason that the same is misleading, is not based upon any issues made by the pleadings in the case, is not applicable to any [249] theory of the case made by the pleadings, and is not based upon any evidence introduced or heard at the trial.

V.

For error of the Court in instructing the jury orally, on its own motion, as follows:

"You are instructed that if you find from the evidence in this case that, subsequent to the time

when Williams borrowed from the plaintiff herein the monies for the recovery of which this action was brought, he communicated fully such facts to the defendant Richards, and informed him that the said monies so borrowed in the name of Richards & Williams were to be used in their joint enterprise, and that said Richards did not, on receipt of such information within a reasonable time notify the plaintiff in this action that he was not a partner of defendant Williams, or repudiate the acts of Williams, that such failure to so notify the plaintiff may be considered by you as evidence of ratification of the acts of Williams by Richards."

for the reason that the Court here singled out a vein of evidence and told the jury that they may consider the same as an act of ratification, casting a duty upon Richards to notify the bank of his repudiation of Williams' actions in signing his name to the paper, whereas in law it was not his duty to notify the bank, but the bank's duty to notify him of Williams' act in signing his name to the note in suit, and thus give him the opportunity to affirm or disaffirm the conduct of Williams.

VI.

For error of the Court in instructing the jury orally, on its own motion, in the following language:

"You are instructed that it was not necessary for Williams to have authority to bind Richards in the giving of the note sued on in this action before the execution of the same, provided you

find that Richards thereafter ratified the acts of Williams.

And you are further instructed that such ratification need not be expressed in writing. But his failure to disaffirm the acts of Williams within a reasonable time, or to repudiate the actions of Williams and notify the plaintiff thereof in this action within a reasonable time, may be held to constitute a ratification of the acts of defendant Williams so that the defendant Richards will then become liable for such indebtedness. Of course, an act of ratification, [250] either by failure to protest, or by express affirmative acts, implies that the party had full knowledge of such acts as had been done by his agent; and, unless he had such knowledge, he would not be held to have ratified them by any failure to act or disaffirm them. Ratification means a confirmation of an act previously done by another." for the reason that the Court here instructs the jury upon a theory of the case not developed by the pleadings or made by the issues in the case, and singles out a vein of supposed evidence and declares the force and effect that the jury should give thereto, and instructs them with reference to something that was not disclosed by any evidence in the case.

VII.

For error of the Court in instructing the jury orally, on its own motion, in the following language:

"You are instructed that no authority in writing is necessary to authorize another to sign his name to a note, provided the authority is

given in some way, or provided the acts of the party so signing another's name to the note are ratified by that other afterwards with full knowledge of what has been done. And in this case if the note was signed in the name of Richards & Williams with the intention on the part of Williams to bind both parties, and he either had such authority from Richards beforehand, or if Richards, with full knowledge of what had been done, ratified such act afterwards either by affirming the same or by failure to notify the payee of the note that the same was signed without his authority, within a reasonable time, then he may be held to have been bound in the same manner as if such authority had been given in writing beforehand."

for the reason that the same is not within any of the issues made by the pleadings, is upon an entire different theory from the one tendered by the plaintiff in its complaint, is not based upon any evidence introduced by either party, and is misleading.

VIII.

For the error of the Court in refusing to give the special instruction requested by the answering defendant Richards and numbered 2, which is in the following language:

"The Court instructs the jury that a mining partnership can only exist where several parties co-operate in working [251] mining property; mere ownership as tenants in common, either of the mining ground itself or a leasehold thereon, not being sufficient.

Where a mining copartnership is shown to exist within the definition above given, each partner has power to bind his copartners by dealing on credit and the giving of promissory notes for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; but one mining copartner has no implied power or authority to borrow money and sign the firm name to a promissory note as evidence of such loan, where the money is to be and is used in purchasing mining ground or interests therein or assignments of leases thereon, and if he does so without the knowledge or consent of his copartners they are not liable thereon.

Applying the law as given above to the testimony in this case, I charge you that if you find from the testimony that no mining copartnership existed between the defendants Edward Williams and Edwin Richards on the 24th day of February, 1911, the date of the note which is the subject of this action; or if you find that they were on and before said day such copartners but that the money evidenced by the said promissory note was, on or before that date and without the knowledge or consent of the defendant Edwin Richards, borrowed by the defendant Edward Williams from the plaintiff bank, for the purpose of being used in the purchase of an interest in a lease on Flat Creek in the Iditarod country and that said money was so used, then in either event the defendant Edwin

Richards is not liable upon the said note; unless afterwards, with full knowledge of all the material facts connected therewith, he ratified the making and signing of the said note by the said Edward Williams. The word "ratification" means a confirmation of a previous act done by another."

for the reason that while the Court did read to the jury the opening paragraph of the said special instruction Number 2, it omitted the balance of said instruction which is an application of the abstract law in said opening paragraph to the testimony in the case.

IX.

For the error of the Court in refusing to give the special instruction requested by the answering defendant Richards and numbered 3, which is as follows:

"The Court instructs the jury that the naked declaration or representation of one person that another person is his mining partner or that he is that other's agent with authority to sign promissory notes by reason of such copartnership, is not evidence of a mining partnership or agency, as against such other person.

Applying the foregoing rule of law to the testimony [252] in the case, if you find therefrom that on or about the 6th day of October, 1910, at Iditarod City and at the time the note of that date for \$3,500.00 was signed by the defendant Edward Williams in the name of 'Richards & Williams' as shown by Plaintiff's Exhibit

'5,' the said Williams declared and represented to C. J. Hurley, manager of the plaintiff bank, that he and the defendant Edwin Richards were mining copartners, and for that reason he was authorized to borrow money and sign the firm name 'Richards & Williams' to a promissory note for the amount of money so borrowed, then I charge you that under such circumstances the said Hurley, acting for said bank, had no legal right to rely solely on such declaration or representation and if he did so it was at the peril and risk of the plaintiff bank. Under the conditions stated above it would have been the duty of the officers of the bank to make other and independent inquiries as to the truth of the statements made by Williams, and if you find from the evidence that the said officers failed to make such inquiries and that Williams was not at the time a mining copartner with Richards and was not authorized to sign the note, the bank must bear the loss, if any, and not the defendant Edwin Richards.

The Court further instructs the jury that all that is said above with reference to the note, Plaintiff's Exhibit '5,' applies with equal force to the note, Plaintiff's Exhibit '6,' made the basis of this action and copied in the body of the complaint, so far as the liability of the defendant Edwin Richards is concerned, growing out of the signature thereon 'Richards & Williams.'

The note in action (Plaintiff's Exhibit '6') is also signed by individual names as follows: 'Ed-

ward Williams, Edwin Richards by Edward Williams, his attorney in fact.' With reference to such signatures, you are instructed that as the name of defendant Edwin Richards purports on the face of the note in action to have been signed by Edward Williams under the authority of a power of attorney, but the evidence conclusively shows that he had no power of attorney or other written authority to sign said note for defendant Richards, it follows that the plaintiff cannot recover against said Richards by reason of such individual signatures unless you should further find from a preponderance of the evidence that the defendant Edwin Richards, after full knowledge of all the material facts connected with the signing of the said note, ratified the action of the said Edward Williams in the execution and delivery thereof."

for the reason that, while the Court did read the opening paragraph of said special instruction numbered 3, he withheld from the jury the remaining part of the instruction which applied the abstract principle of law stated in the opening paragraph, to the evidence in the case. [253]

X.

For the error of the Court in refusing to give the special instruction requested by the answering defendant Richards and numbered 4, which is as follows:

"Where a promissory note is signed by one person for another as that other's Attorney in Fact, as the note copied in the complaint was,

the one taking such note is put on his guard by the form of the signature and is bound to inquire whether the person so assuming to sign for such other in fact held a power of attorney or other written authority to so act, and if it turn out that he did not have such written authority the note is void as against such other.

Applying the foregoing rule of law to the testimony in this case, if you find from the evidence that the defendant Williams on February 24, 1911, did not have a power of attorney or other written authority from the defendant Richards authorizing him to sign the name of the defendant Richards to promissory notes, then the action of the said Williams in signing the note copied in the complaint was ineffectual to bind Richards and he would not be liable for the payment thereof; unless you should further find from a preponderance of the evidence that, after being fully informed of all the facts in the premises, he ratified the action of Williams in signing his name to the said note."

which said error consisted in failing to give the said special instruction number 4, and also stating nothing covering the same ground in the general oral charge of the Court.

XI.

The Court erred in sustaining the objection of plaintiff to the three letters of the defendant Edward Williams to defendant Edwin Richards, which said letters tended to contradict the oral testimony, and oral and documentary evidence of the said Williams

when on the witness-stand, and were proper cross-examination of the said Williams as a witness, which said letters were marked Defendant's Exhibits 3, 4 and 5, for identification, respectively.

XII.

The Court erred in sustaining the objection of the plaintiff to defendant's offer of a letter from defendant Edwin Richards [254] to the plaintiff Bank, which was marked Defendant's Exhibit No. 6, for identification, and is in the words and figures as follows:

“WINCHESTER ANNEX.

Third Street.

San Francisco, Cal. Jan. 2/12.

American Bank of Alaska,

Fairbanks,

Mr. Bruning,

Dear Sir: I have just received pass book and a note concerning a note from Iditarod for \$3500.00 and overdraft for a sum \$327.00 which had evidently been long on the way, but will comply with an answer at once, as it is a surprise to me, I am sure you are aware I have not signed that note, neither was Williams or any one else authorized to do any business of that nature in my name, as for the overdraft, also I had nothing whatever to do with their operations at Iditarod. I stand ready at any and all times to settle my accounts, as my record up in Alaska will show, and if any further information in this matter is required, my address at present is above, but I expect to be in Fairbanks about end of

March this year, when I will call on you on my way back to Hot Springs.

Respectfully yours,

(Signed) EDWIN RICHARDS."

for the reason that the said letter was a repudiation of the actions of the defendant Williams in signing the name of said Richards to the note in suit, and was written promptly after the first notification that the said Richards received of the action of the said Williams in so doing, and the exclusion of said letter was particularly damaging to the answering defendant Richards for the reason that the Court instructed the jury that if said Richards failed to repudiate the action of Williams promptly after notice, that he, Richards, was liable.

XIII.

The Court erred in denying the motion of the answering defendant Richards for a new trial, on the grounds stated therein.

XIV.

The court erred in receiving the verdict of the jury and rendering a judgment thereon, and especially in rendering a [255] judgment against the answering defendant Richards as a member of a supposed firm of Richards & Williams, and against said Edwin Richards as an individual, for the sum of \$3,500.00, and an attorney's fee of \$750.00, and all the costs of the action to be taxed by the Clerk.

LOUIS K. PRATT & SON and

THOMAS A. MARQUAM,

Attorneys for Edwin Richards, Answering Defendant Below, and Plaintiff in Error in the Appellate Court.

Rec'd a copy of the foregoing assignment of errors
Apr., 1914.

McGOWAN & CLARK,

Attys. for Plff. Bk.

[Endorsements.] [256]

[Caption and Title.]

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named Edwin Richards, answering defendant below and plaintiff in error in the Appellate Court, and complains that in the record and proceedings had in the said cause, and also in the rendition of the judgment in the above-entitled cause, in the said District Court, at the November, 1913, Term thereof, against the said answering defendant and plaintiff in error, on the 20th day of April, 1914, manifest error hath happened, to the great damage to the said Edwin Richards, answering defendant and plaintiff in error:

Wherefore said plaintiff in error prays the judge of this court for the allowance of a Writ of Error, for an order fixing the amount of bond to cover costs in the said cause upon the said review, for an order fixing San Francisco, in the State of California, as the place of such review, and for such other orders and process as may cause the same to be corrected by the [257] said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 20th day of April, 1914.

LOUIS K. PRATT & SON and
THOMAS A. MARQUAM,

Attorneys for Edwin Richards, Answering Defendant Below, and Plaintiff in Error.

Allowed—F. E. FULLER,
Judge.

Received copy Apr. 20, 1914.

McGOWAN & CLARK,
Attorneys for Plaintiff Below and Defendant in Error.

[Endorsements.] [258]

[Caption and Title.]

Order Allowing Writ of Error and Fixing Amount of Bond.

The answering defendant Edwin Richards, plaintiff in error, having this day filed his petition for Writ of Error from the decision and judgment as against him thereon made and entered herein, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with an Assignment of Errors within due time, and also praying that an order be made fixing the amount of security which the said answering defendant and plaintiff in error should give and furnish to cover the costs upon said Writ of Error, and also designating the place where such review should be heard, and said petition having been this day duly allowed:

NOW, THEREFORE, IT IS ORDERED that said Writ of Error be granted and the place of the said

review shall be San Francisco, in the State of California, and that the said answering defendant and plaintiff in error shall file in this court a bond in the sum of (\$500.00) five hundred dollars, to be approved by the Judge of this court, to the effect that if the said answering defendant and plaintiff in error shall prosecute the said Writ of Error to effect, and answering all costs if he fail to make good his plea, then the said obligation to [259] be void; else to remain in full force and virtue.

Dated this 21st day of April, 1914.

F. E. FULLER,

District Judge.

Received a copy this 21st day of April, 1914.

McGOWAN & CLARK,

Attorneys for Plaintiff, and Defendant in Error.

Entered in Court Journal No. 12, page 911.

[Endorsements.] [260]

[Caption and Title.]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Edwin Richards, answering defendant and plaintiff in error, as principal, and Robert Jones and L. A. Hanson as sureties, are held firmly bound unto the plaintiff and defendant in error the American Bank of Alaska, a corporation, in the sum of (500) Five Hundred dollars, to be paid to said plaintiff below and defendant in error, its successors or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and

severally, and our and each of our representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 27 day of April, 1914.

Whereas, the above-named Edwin Richards, answering defendant and plaintiff in error, has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the Territory of Alaska, Fourth Judicial Division.

Now, therefore, the condition of this obligation is such that if the above-named Edwin Richards, answering defendant below and plaintiff in error, shall prosecute said Writ of Error to effect and answer all costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise to be and [261] remain in full force and effect.

EDWIN RICHARDS,
Principal.
ROBERT JONES,
L. A. HANSON,
Sureties.

United States of America,
Territory of Alaska,—ss.

Robert Jones and L. A. Hanson, sureties on the foregoing bond, each for himself, and not one for the other, on oath say: I am a resident of Tofty in the Territory of Alaska, and am not an attorney or counsellor at law, marshal or deputy marshal, clerk, or other officer of any court, and am worth the sum set

opposite my name, to wit:

Robert Jones.....\$1000.00

L. A. Hanson..... 500.00

over and above all my just debts, liabilities and exemptions.

ROBERT JONES.

L. A. HANSON.

Subscribed and sworn to before me this 27 day of April, 1914.

[Seal]

L. P. SNYDER,

A Notary Public for Alaska.

My commission will expire ———.

O. K.—McGOWAN & CLARK,

per John A. Clark.

The foregoing Bond is approved by me the 2d day of May, 1914.

F. E. FULLER,

Judge.

Copy Recd. 4/21/14. No blanks filled.

McGOWAN & CLARK.

[Endorsements.] [262]

Writ of Error.

UNITED STATES OF AMERICA.—ss.

The President of the United States, to the Honorable, the Judge of the District Court for the Territory of Alaska and District of Alaska, Fourth Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea *which in* said District Court before you between Edwin Richards, plaintiff in error, and American Bank of Alaska, a corporation, defendant in error, a manifest error

hath happened to the great damage of the said plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 1st day of June, Nineteen Hundred and Fourteen, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 2 day of May, Nineteen Hundred and Fourteen.

[Seal]

ANGUS McBRIDE,
Clerk of the U. S. District Court for the Territory of
Alaska, Fourth Division. [263]

The foregoing Writ is hereby allowed.

F. E. FULLER,
Judge.

Service of the foregoing Writ of Error and receipt of copy thereof is hereby admitted this 2d day of May, 1914.

McGOWAN & CLARK,
Attorneys for Defendant in Error. [264]

[Endorsed]: No. 1815. In the United States Court of Appeals for the Ninth Circuit. Edwin Richards, Plaintiff in Error, vs. American Bank of Alaska, Defendant in Error. Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. May 2, 1914. Angus McBride, Clerk. By _____, Deputy. [265]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to American Bank of Alaska, a Corporation, or to McGowan & Clark, Its Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court for the Territory and District of Alaska, of the Fourth Division thereof, wherein Edwin Richards is the plaintiff in error, and American Bank of Alaska, a corporation, is the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the plaintiff in error in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 2d day of May, 1914, and of the Independence of the United States the one hun-

dred and thirty-eighth.

F. E. FULLER,

District Court Judge Presiding in the District Court
for the Territory and District of Alaska, Fourth
Division.

Attest: ANGUS McBRIDE,

Clerk of the District Court for the Territory and
District of Alaska, 4th Division.

Service of the above Citation by the receipt of a
copy thereof is hereby admitted this 2d day of May,
1914.

[Seal]

McGOWAN and CLARK,

Attorneys for Defendant in Error. [266]

[Endorsed]: No. 1815. In the United States Cir-
cuit Court of Appeals for the Ninth Circuit. Edwin
Richards, Plaintiff in Error, vs. American Bank of
Alaska, Defendant in Error. Citation on Writ of
Error. Filed in the District Court, Territory of
Alaska, 4th Div. May 2, 1914. Angus McBride,
Clerk. By —————, Deputy. [267]

[Order Enlarging Return Day of Writ of Error.]

[Caption and Title.]

On application of the said plaintiff in error, by
reason of the great distance between Fairbanks,
Alaska, and San Francisco, California, and the delays
and uncertainties of the transmission of mail matter
between the said points,

IT IS ORDERED that the return day of the writ
of error allowed in this cause as the first day of June,
A. D. 1914, be enlarged to the first day of August,
A. D. 1914.

Dated at Fairbanks, Alaska, this 2d day of May, 1914.

F. E. FULLER,
Judge.

Entered in Court Journal No. 12, page 919.

Service admitted this 2d day of May, 1914.

McGOWAN & CLARK,
Attys. for Plaintiff. [268]

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Edwin Richards, Plaintiff in Error, vs. American Bank of Alaska, Defendant in Error. Order Extending Time to File Transcript. Filed in the District Court, Territory of Alaska, 4th Div. May 2, 1914. Angus McBride, Clerk. By ———, Deputy. [269]

[Certificate of Clerk U. S. District Court to
Transcript of Record].

[Caption and Title.]

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, Angus McBride, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of two hundred and seventy-one pages, numbered from 1 to 271, inclusive, constitutes a full, true and correct transcript of the record on writ of error in cause No. 1815, entitled American Bank of Alaska, Plaintiff, vs. Edward Williams and Edwin Richards, Mining Copartners Engaged in Business Under the Firm Name and

Style of Richards & Williams, and Richards & Williams, a Mining Copartnership, Defendants, wherein Edward Williams and Edwin Richards, mining copartners engaged in business under the firm name and style of Richards & Williams, and Richards & Williams, a mining copartnership, are plaintiffs in error, and American Bank of Alaska are defendants in error, and was made pursuant to and in accordance with the praecipe of the plaintiff in error filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause and is the return thereof in accordance therewith.

And I do further certify that the original Writ of Error, Citation on Writ of Error, Order Enlarging Return Day, and Stipulation as to Printing Record are included in said transcript, and that the Index thereof, consisting of pages i to ii, is a [270] correct index of said transcript of record; also that the costs of preparing said transcript and this certificate, amounting to ninety-eight and 40/100 dollars (\$98.40), have been paid to me by counsel for plaintiffs in error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, this ninth day of June, 1914.

[Seal]

ANGUS McBRIDE,

Clerk District Court, Territory of Alaska, Fourth Division. [271]

[Endorsed]: No. 2440. United States Circuit Court of Appeals for the Ninth Circuit. Edwin Richards, Plaintiff in Error, vs. American Bank of Alaska, a Corporation, Defendant in Error. Tran-

script of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Received and filed June 30, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2440.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

EDWIN RICHARDS,

Plaintiff in Error,

vs.

AMERICAN BANK OF ALASKA, a Corporation,

Defendant in Error.

Brief on Behalf of Plaintiff in Error.

LOUIS K. PRATT,

THOMAS A. MARQUAM,

Attorneys for Plaintiff in Error.

METSON, DREW & MACKENZIE,

E. H. RYAN,

Of Counsel.

Filed this.....day of March, 1915.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

Filed

THE JAMES H. BARRY CO.

MAR 9, 1915

F. D. Monckton,

Clerk.

No. 2440.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

EDWIN RICHARDS,

Plaintiff in Error,

vs.

AMERICAN BANK OF ALASKA,

a Corporation,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error in an action at law brought by the American Bank of Alaska against Edward Williams and Edwin Richards by the filing of a complaint in the District Court of Alaska, Fourth Division, on the 14th day of August, 1912, to recover on a certain promissory note dated *February 24, 1911*,

for \$3500 and also to recover for an overdrawn account at the bank in the sum of \$327.96, which latter cause of action was thereafter dismissed by the plaintiff (Tr., 12). The complaint alleges that the defendants were *mining* co-partners, engaged in business in the Iditarod District of the Territory of Alaska, under the name of Richards & Williams. That in the month of September, 1910, the bank loaned the defendants a sum in excess of thirty-five hundred dollars, which the defendants agreed to repay, and on the 24th of February, 1911, made the note in controversy in consideration of the moneys theretofore loaned. That the note and interest were never paid. And judgment is asked for the face value interest, and attorneys' fees as provided in the note (Tr., 3).

Williams defaulted but his default was never entered until the close of third trial of the case (Tr., 244). Richards answered, denying all allegations of the complaint (Tr., 9). It appears that the verdict and judgment from which this appeal is taken was had after three trials, the last resulting in a verdict against the defendants as "co-partners Richards & Williams and the defendant Edwin Richards" in the full amount of the note, without interest, and allowed attorney's fees in the sum of \$750.00 (Tr., 15-16).

Upon the trial the following facts were developed:

Edwin Richards had mined on quite a large scale on Dome Creek near Fairbanks for several years,

and in 1908 went into the Hot Springs District and commenced mining operations with a large plant and machinery on Cache Creek, where he had an interest in some twenty claims (Tr., 192), and was still working them at time of trial. He was a man of good financial reputation and his standing was excellent with the banks (Tr., 163, 171). Prior to going down from Dome Creek, Williams, whom Richards had known in Dawson, had been employed by him on Dome Creek for a year or more (Tr., 60, 192). He was a sort of general hanger on around Richards, doing the cooking when Richards had men enough without his mining and mining otherwise. When Richards went to the Hot Springs, Williams followed him down and worked for him, chiefly at cooking, during the summer of 1909 (Tr., 22, 61, 191-2). At this time Richards was working a lay over on Cache Creek, but going out in the fall, turned the lay over to Williams and a man by the name of Johanson, together with the plant, the stuff in the mess house, etc., and left them some little credit at the store. The result of this lay was disastrous, as when they quit in August, 1910, they owed Richards six or seven hundred dollars, which was a dead loss to the latter (Tr., 62-3, 192). In the spring of 1910, Richards returned to Cache Creek but was hurt and spent a good part of the summer at the hospital and at Gibbon, but when he got back to Cache Creek he lived at the same mess house as Johanson and Williams, and had a

cabin close by. There was a phone theretofore paid for by Williams and Johanson, but when Richards came he used it and paid his share of it, but there was no partnership of any kind claimed between them (Tr., 63, 193). In the spring of 1910 Williams was in correspondence with a man by the name of Boulton, who owned a half interest in a lease on Flat Creek, in the Iditarod country, a distance of about 1100 miles from the Hot Springs country. Williams and Boulton had been old-time friends and partners in Dawson (Tr., 60, 61). Boulton represented to Williams that he had a lay and was having trouble with his partners and wanted Williams to come down and buy a quarter interest in it. Boulton knew that Richards had money and Williams admits that he may have told Boulton that. In any event, Williams spoke to Richards about this lease when Richards returned to Cache Creek in 1910 and they had some talk of no particular importance about it. Later, in September, 1910, a telegram came from Boulton, addressed to Richards at Hot Springs to "send \$2000 at once through N. C. fifty thousand at stake. Freeze out game, don't fail to see letter" (Tr., 69, 196). It was phoned to Richards at Cache Creek. Richards showed the telegram to Williams with the statement that he didn't think it was meant for him and that it must have been for Williams. This letter referred to was afterwards received by Williams, being addressed to him, and was forwarded to the Iditarod

(Tr., 70). But they discussed the matter and Richards said he could not go down or send any money down, and didn't want anything to do with it, but being desirous that Williams should have a chance, asked Williams if he would like to go, who responded "what was the use of talking, he had no money" (Tr., 71, 197). To which Richards replied, "Well, if you think you could do yourself any good by going down there I would give you the money to go down." Williams was only too glad of the opportunity. In a day or two Richards and he went to Hot Springs and Richards gave Williams some \$2500, a \$2300 check and \$200 in currency (Tr., 73, 200).

Williams, who was the chief witness for the bank, testified that he then went immediately to the Iditarod; that he had no understanding whatever with Richards that he was to go down there and buy the quarter interest from Boulton and take an assignment in the name of himself and Richards; that he had no verbal or written contract with Richards that he would go down there, buy into that lease on Flat Creek for the benefit of himself and Richards, and that they would mine there as mining co-partners that summer. There was nothing said about a co-partnership name or that he was to put the money Richards gave him in the name of the partnership of Richards and Williams, or about dividing profits and losses, but he was to go down there and use his

judgment about buying. In fact, he testified that he expressed his appreciation to Richards in giving him the money to go, saying he would do the right thing in return, and went (Tr., 78-9-80-81).

Richards charged Williams up in his private books in a personal account standing in Williams' name for the \$2500 advanced, and for the moneys paid for the boatman who took Williams to Gibbon on the way to the Iditarod. This was outside of the account standing on Richards' books in the name of Williams and Johanson regarding the money they owed him on the lay which had proved a failure (Tr., 228).

Notwithstanding this Williams went to the Iditarod and first deposited the money with the Miners' & Merchants' Bank in his own name (Tr., 81-85). He met Boulton, found he was having trouble with his then partners, Shively and Kennedy, who owned half of the lay, and he bought half of Boulton's interest, or a quarter of the whole lay, at \$2000. Boulton wanted him to buy out the other two and he decided to do so (after going out and looking over the ground) at a cost of \$4500. It then became necessary to raise the extra money. He could not get it at the Miners' & Merchants' Bank where he had deposited the \$2300 in his own name. Nor did he offer there to get the money on a paper signed Richards & Williams (Tr., 87). But he went to a man by the name of Morgan who knew Richards, told him what he wanted; that he had no power of attorney from

Richards but he would like to make a loan and *considered* Richards his partner. Then Morgan introduced him to Hurley, president of the plaintiff, and he told Hurley the same thing.

Hurley knew Richards by sight, and knew he was a man of means, employed people and responded to all his obligations, although he had never heard or knew of Williams when he came to the bank, and testified he would not lend him any money (Tr., 171-5). But upon Williams' statement that Richards was his partner and without wiring or writing Richards, or making any inquiries to establish the fact, loaned Williams \$3500 which was placed to his credit under the name of Richards & Williams. Prior to this Williams had taken the money Richards had loaned him from the Miners' & Merchants' Bank and deposited it with the plaintiff under the partnership name of Richards & Williams, at Hurley's suggestion (Tr., 32). A note was made payable in ninety days, dated October 6, 1910, signed Richards & Williams by Ed. Williams (Tr., 34). The Bank never notified Richards of the making of this note in any way. Hurley advised Williams to notify Richards, which the latter did, fairly describing the transaction (Tr., 39), which letter Richards received on December 7th, to which he replied in effect, denying Williams' right to sign his name to the note and more or less upbraiding him for doing so (Tr., 44). Later, Richards wrote a letter dated December 16th, severely

criticizing the action of Williams in signing his name to the note, one sentence in which was to the effect that he (Richards) "would not be responsible for any note, check or any other written instrument to which Williams might have signed or should sign his name to in the Iditarod Country." This letter was proven by the defense to have been destroyed by Williams, but the contents were shown beyond all question by Richards (Tr., 204), and admitted by Williams (Tr., 96, 97, 113, 115, 116, 117). Richards wrote another letter couched in milder language on December 26th, 1910, but along the same general lines (Tr., 51). Williams received these letters in the Iditarod in the latter part of January, 1911 (Tr., 99), and informed Hurley of at least a portion of their contents. From the time that the note of October 6, 1910, was due and payable in January, 1911, Hurley was constantly pressing payment up to the making of the note of February 24, 1911, sued on in this action. Williams had informed Hurley that Richards did not want to stay in the transaction and that he would have to get other partners (Tr., 101), and Hurley was aware that he was negotiating and did finally make a sale of a half interest to two men by the name of McKenzie and McLellan (Tr., 124), retaining a quarter interest.

On February 24, 1911, Hurley insisted on the giving of the new note and also required the making of a mortgage on the three-quarter interest in the lease. He had Williams send a blank bill of sale to Rich-

ards, by which the latter conveyed to Williams all his interest in the lay, with the understanding on the part of Hurley and Williams that if a new note was executed and a mortgage covering the three-quarter's interest in the lay, that when the bill of sale came back from Richards, Richards should be released from all responsibility (Tr., 102-3-4). The new note, and mortgage to secure it, were made as between Edward Williams and Edwin Richards as parties of the first part, and American Bank of Alaska, as the second party. It was distinctly understood by Hurley at the time of the making of this new note and a mortgage to secure it, that Williams had no power of attorney or any written authority to act for Richards or sign his name and discussion was had relative to the fact. Counsel was taken with attorneys and it was finally decided that Williams should sign his name and Richards' name by himself as attorney in fact, notwithstanding that Williams had no power of attorney, Hurley remarking that it wasn't business, but he would take a chance on it (Tr., 89).

The note and mortgage were then executed in that form (Tr., 31, 88-89, 166-7, 180). When Williams purchased the interest of Shively and Kennedy at the time of obtaining the \$3500 on the first note, he took the assignment of the interest in the name of Williams & Richards, but making a note to Kennedy for a part of his payment (some eight hundred dollars), he signed his own, not Richards' name (Tr., 91-2).

There were some moneys owing by Kennedy and Shively, and Williams paid a part of the purchase price in checks to various poeple, and he did not sign Richards' name or any partnership name to these checks, but signed his own. He bought a boiler for \$2100 to be used in working the lay, paying \$700 cash to one Tom Aitkin, and gave a note in his own name to Aitkin for the balance. In fact, never signed any notes or contracts in the name of Richards or of the alleged partnership, other than the original note of October 6th, and the note of February 24th in suit (Tr., 92-3), which it appears was done solely on the suggestion of Hurley. The evidence shows both from the testimony of Williams and his correspondence with Richards that he was very apprehensive about the result of his making these notes in Richards' name and his lack of authority to do so. As he testified, he felt that he had placed himself in a very delicate position (Tr., 118). The Bank never notified Richards at all of the making of the first note, although Hurley testified that it was entirely "on the strength of the statement made by Williams that Richards was his partner and upon the strength of Richards' name" that the money was loaned (Tr., 173-189). And Richards never knew or heard that the assignment of the three-quarter interest in the lease was taken in his name, together with that of Richards, until May, 1911, when he received the blank quit claim deed to execute, reconveying to Williams, with

a request that he sign it and send it back, which he did (Tr., 228). This was the letter of April 4, 1911 (Defendant's Exhibit 2) (Tr., 124), wherein he was told that if he would sign and send this bill of sale back, conveying to Williams, he would be released of all obligations, and in which letter Williams said, "if you want some security for the money you gave me I can give you the quarter interest which I still hold" (Tr., 125).

During the summer of 1911, mining operations were carried on on quite an extensive scale on the lay on Flat Creek by a copartnership composed of Williams, Boulton, McLennon and McKenzie, and there was no claim whatever from anybody that Richards had any more to do with these operations than had the Czar of Russia or the Kaiser Wilhelm. During the summer of 1911, the plaintiff collected large sums of money from that outfit (Tr., 184-187). The clean-ups were pretty good until August and the firm had deposited gold dust to meet their checks at the Bank to the extent of possibly fifty thousand dollars, and when the mine closed down, there was an overdraft of some three hundred odd dollars (Tr., 186-187), the amount of the second cause of action dismissed (on second thought by the Bank), as the evidence conclusively showed that Richards never had anything to do with these mining operations at Flat Creek or at any other point in the Iditarod District.

So far as the note of February 24, 1911, is con-

cerned, Richards never heard of this note until he received a letter which was written by the Bank some time in October and received by him on December 28, 1911, at San Francisco. This letter was ruled out as well as the reply of Richards thereto, written four days later and dated January 2, 1912, in which he expressed his surprise and repudiated the note in unmistakable terms (Tr., 206-208). Later, in the year 1912, he was in Fairbanks and went to the Bank and again repudiated the note (Tr., 211). This Hurley also admits (Tr., 245). Action was brought on the note in the following September, resulting in a verdict for the Bank in the full face of the note but without interest, although interest was shown to have accumulated to the amount of \$1295 (Tr., 168).

Upon this verdict a judgment was rendered against Richards and Williams and against Richards individually for \$3500 and an attorney's fee of \$750.00; and against Williams individually for \$3500 with interest from February 24, 1911, at 12 per cent. per annum and attorney's fees in the sum of \$750.00 (Tr., 19).

By reason of this judgment and because of numerous errors in the instructions to the jury, as well as in the rulings on the evidence, Richards felt himself aggrieved and prosecutes this writ of error, specifying as reasons for a reversal of the judgment of the Court below, the following errors, to wit:

ASSIGNMENT OF ERRORS.

I.

For the error of the trial Court in instructing the jury orally, on its own motion in the following language:

"On the part of the plaintiff it is contended that in the latter part of September, 1910, in the Hot Springs Precinct in this division, the defendants Williams and Richards entered into an agreement of partnership whereby Richards agreed to advance a certain amount of money for the use of such partnership, and the defendant Williams agreed to proceed to the Iditarod and to investigate conditions there and that it was also agreed between them that if it should seem advisable to said Williams, after arriving in Iditarod, and after such investigation, that he should purchase an interest in a certain lay or lease upon a mining claim on Flat Creek. It is further contended by the plaintiff that Williams did proceed to Iditarod, pursuant to such agreement, and did purchase for said partnership an interest in a lay or lease on Flat Creek and, for the purpose of making such purchase, did borrow the sum of thirty-five hundred dollars from plaintiff, and, on or about October 6, 1910, made and delivered to plaintiff a promissory note therefor, signed by Williams in the name of Williams & Richards.

"Plaintiff further contends that Richards was informed by Williams of this transaction, and that he ratified the same, and that thereafter on or about the 24th day of February, 1911, the defendant Williams executed to the plaintiff the note which has been introduced in evidence, bearing date on that day, and that the same was given for

the money theretofore loaned, and in renewal of the note made on or about October 6, 1910, and that this note was executed as the note of Williams & Richards, and that Williams was authorized to execute such note on behalf of the defendant Richards."

II.

For the error of the Court in instructing the jury orally, on its own motion, in the following language:

"You should consider, therefore, whether or not the defendants Williams and Richards entered into any partnership agreement as alleged by the plaintiff, and whether or not, if you find that they did enter into such agreement, it was contemplated thereby that the said Williams should have authority to borrow money for the purposes of such partnership, and whether or not the monies borrowed by him from the plaintiff were for such purposes, if you find that a partnership had been formed theretofore between Williams and Richards."

III.

For the error of the Court in instructing the jury orally, on its own motion, in the following language:

"You are instructed that if you find from the evidence in this action that such partnership was formed with the defendants, and that it was contemplated thereby that Williams should have authority to borrow money for the partnership use, and that such sum of money was borrowed from the plaintiff by Williams for such partnership

purposes, and the notes above mentioned given to plaintiff therefor, then your verdict should be for the plaintiff."

IV.

For the error of the Court in instructing the jury orally, on its own motion, as follows:

"In case you should find that such copartnership was not formed between the defendants, or that Williams was not authorized to borrow money for partnership purposes, or that the money loaned by the plaintiff was not for partnership purposes, then you should consider whether or not the defendant Richards was informed of the transactions between Williams and the plaintiff, and whether or not the defendant Richards, after having been fully informed of such transactions, ratified the same.

"You are instructed that if you find that the defendant Richards was fully informed of the transactions between the plaintiff and Williams, and that said sum of money was loaned by the plaintiff to Williams for the use of Williams & Richards, and that on or about October 6, 1910, the defendant Williams executed the note to the plaintiff for said sum of money and signed thereto the name of Richards, or the firm name of Williams & Richards, and that Richards, having been fully informed of these transactions, ratified the same, that then such ratification of the acts of Williams by Richards would have the same effect as if authority to perform such acts had previously been given by Richards to Williams. And, if you find that said acts of Williams were so ratified by Richards, then your verdict should be for the plaintiff, provided you also find that

the note in issue was given as a renewal of the note of October 6, 1910, and in consideration of the loan originally made."

V.

For error of the Court in instructing the jury orally, on its own motion, as follows:

"You are instructed that if you find from the evidence in this case that, subsequent to the time when Williams borrowed from the plaintiff herein the monies for the recovery of which this action was brought, he communicated fully such facts to the defendant Richards, and informed him that the said monies so borrowed in the name of Richards & Williams were to be used in their joint enterprise, and that said Richards did not, on receipt of such information within a reasonable time notify the plaintiff in this action that he was not a partner of defendant Williams, or repudiate the acts of Williams, that such failure to so notify the plaintiff may be considered by you as evidence or ratification of the acts of Williams by Richards."

VI.

For error of the Court in instructing the jury orally, on its own motion, in the following language:

"You are instructed that it was not necessary for Williams to have authority to bind Richards in the giving of the note sued on in this action before the execution of the same, provided you find that Richards thereafter ratified the acts of Williams.

"And you are further instructed that such ratification need not be expressed in writing. But his failure to disaffirm the acts of Williams within a

reasonable time, or to repudiate the actions of Williams and notify the plaintiff thereof in this action within a reasonable time, may be held to constitute a ratification of the acts of defendant Williams so that the defendant Richards will then become liable for such indebtedness. Of course, an act of ratification, either by failure to protest, or by express affirmative acts, implies that the party had full knowledge of such acts as had been done by his agent; and, unless he had such knowledge, he would not be held to have ratified them by any failure to act or disaffirm them. Ratification means a confirmation of an act previously done by another."

VII.

For error of the Court in instructing the jury orally, on its own motion, in the following language:

"You are instructed that no authority in writing is necessary to authorize another to sign his name to a note, provided the authority is given in some way, or provided the acts of the party so signing another's name to the note are ratified by that other afterwards with full knowledge of what has been done. And in this case if the note was signed in the name of Richards & Williams with the intention on the part of Williams to bind both parties, and he either had such authority from Richards beforehand, or if Richards, with full knowledge of what had been done, ratified such act afterwards either by affirming the same or by failure to notify the payee of the note that the same was signed without his authority, within a reasonable time, then he may be held to have been bound in the same manner as if such authority had been given in writing beforehand."

VIII.

For the error of the Court in refusing to give the special instruction requested by the answering defendant Richards and numbered 2, which is in the following language:

“The Court instructs the jury that a mining partnership can only exist where several parties co-operate in working mining property; mere ownership as tenants in common, either of the mining ground itself or a leasehold thereon, not being sufficient.

“Where a mining copartnership is shown to exist within the definition above given, each partner has power to bind his copartners by dealing on credit and the giving of promissory notes for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; but one mining copartner has no implied power or authority to borrow money and sign the firm name to a promissory note as evidence of such loan, where the money is to be and is used in purchasing mining ground or interests therein or assignments of leases thereon, and if he does so without the knowledge or consent of his copartners they are not liable thereon.

“Applying the law as given above to the testimony in this case, I charge you that if you find from the testimony that no mining copartnership existed between the defendants Edward Williams and Edwin Richards on the 24th day of February, 1911, the date of the note which is the subject of this action; or if you find that they were on and before said day such copartners but that the money evidenced by the said promissory note was, on or before that date and without the knowledge or

consent of the defendant Edwin Richards, borrowed by the defendant Edward Williams from the plaintiff bank, for the purpose of being used in the purchase of an interest in a lease on Flat Creek in the Iditarod country and that said money was so used, then in either event the defendant Edwin Richards is not liable upon the said note; unless afterwards, with full knowledge of all the material facts connected therewith, he ratified the making and signing of the said note by the said Edward Williams. The word 'ratification' means a confirmation of a previous act done by another."

IX.

For the error of the Court in refusing to give the special instruction requested by the answering defendant Richards and numbered 3, which is as follows:

"The Court instructs the jury that the naked declaration or representation of one person that another person is his mining partner or that he is that other's agent with the authority to sign promissory notes by reason of such copartnership, is not evidence of a mining partnership or agency, as against such other person.

"Applying the foregoing rule of law to the testimony in the case, if you find therefrom that on or about the 6th day of October, 1910, at Iditarod City and at the time the note of that date for \$3,500.00 was signed by the defendant Edward Williams in the name of 'Richards & Williams' as shown by Plaintiff's Exhibit '5,' the said Williams declared and represented to C. J. Hurley, manager of the plaintiff bank, that he and the defendant Edwin Richards were mining copartners, and for that reason he was authorized to borrow money and sign the firm name 'Richards & Williams' to a

promissory note for the amount of money so borrowed, then I charge you that under such circumstances the said Hurley, acting for said bank, had no legal right to rely solely on such declaration or representation and if he did so it was at the peril and risk of the plaintiff bank. Under the conditions stated above it would have been the duty of the officers of the bank to make other and independent inquiries as to the truth of the statements made by Williams, and if you find from the evidence that the said officers failed to make such inquiries and that Williams was not at the time a mining copartner with Richards and was not authorized to sign the note, the bank must bear the loss, if any, and not the defendant Edwin Richards.

"The Court further instructs the jury that all that is said above with reference to the note, Plaintiff's Exhibit '5,' applies with equal force to the note, Plaintiff's Exhibit '6,' made the basis of this action and copied in the body of the complaint, so far as the liability of the defendant Edwin Richards is concerned, growing out of the signature thereon 'Richards & Williams.'

"The note in action (Plaintiff's Exhibit '6') is also signed by individual names as follows: 'Edward Williams, Edwin Richards by Edward Williams, his attorney in fact.' With reference to such signatures, you are instructed that as the name of defendant Edwin Richards purports on the face of the note in action to have been signed by Edward Williams under the authority of a power of attorney, but the evidence conclusively shows that he had no power of attorney or other written authority to sign said note for defendant Richards, it follows that the plaintiff cannot recover against said Richards by reason of such individual signatures unless you should further find

from a preponderance of the evidence that the defendant Edwin Richards, after full knowledge of all the material facts connected with the signing of the said note, ratified the action of the said Edward Williams in the execution and delivery thereof."

X.

For the error of the Court in refusing to give the special instruction requested by the answering defendant Richards and numbered 4, which is as follows:

"Where a promissory note is signed by one person for another as that other's Attorney in Fact, as the note copied in the complaint was, the one taking such note is put on his guard by the form of the signature and is bound to inquire whether the person so assuming to sign for such other in fact held a power of attorney or other written authority to so act, and if it turn out that he did not have such written authority the note is void as against such other.

"Applying the foregoing rule of law to the testimony in this case, if you find from the evidence that the defendant Williams on February 24, 1911, did not have a power of attorney or other written authority from the defendant Richards authorizing him to sign the name of the defendant Richards to promissory notes, then the action of the said Williams in signing the note copied in the complaint was ineffectual to bind Richards and he would not be liable for the payment thereof; unless you should further find from a preponderance of the evidence that, after being fully informed of all the facts in the premises, he ratified the action of Williams in signing his name to the said note."

XI.

The Court erred in sustaining the objection of plaintiff to the three letters of the defendant Edward Williams to defendant Edwin Richards, which said letters tended to contradict the oral testimony, and oral and documentary evidence of the said Williams when on the witness-stand, and were proper cross-examination of the said Williams as a witness, which said letters were marked Defendant's Exhibits 3, 4 and 5, for identification, respectively.

XII.

The Court erred in sustaining the objection of the plaintiff to defendant's offer of a letter from defendant Edwin Richards to the plaintiff Bank, which was marked Defendant's Exhibit No. 6, for identification, and is in the words and figures as follows:

"WINCHESTER ANNEX.

Third Street.

San Francisco, Cal., Jan. 2/12.

American Bank of Alaska,
Fairbanks.

Mr. Bruning,

Dear Sir: I have just received pass book and a note concerning a note from Iditarod for \$3500.00 and overdraft for a sum \$327.00 which had evidently been long on the way, but will comply with an answer at once, as it is a surprise to me, I am sure you are aware I have not signed that note, neither was Williams or any one else authorized to do any business of that nature in

my name, as for the overdraft, also I had nothing whatever to do with their operations at Iditarod. I stand ready at any and all times to settle my accounts, as my record up in Alaska will show, and if any further information in this matter is required, my address at present is above, but I expect to be in Fairbanks about end of March this year, when I will call on you on my way back to Hot Springs.

Respectfully yours,
(Signed) EDWIN RICHARDS."

XIII.

The Court erred in denying the motion of the answering defendant Richards for a new trial, on the grounds stated therein.

XIV.

The Court erred in receiving the verdict of the jury and rendering a judgment thereon, and especially in rendering a judgment against the answering defendant Richards as a member of a supposed firm of Richards & Williams, and against said Edwin Richards as an individual, for the sum of \$3,500.00, and an attorney's fee of \$750.00, and all the costs of the action to be taxed by the Clerk.

ARGUMENT.

The case was tried by plaintiff on the theory that while Williams had no authority as a mining partner nor in virtue of any written power of attorney to sign Richards' name to the notes or to any other writings, yet that Williams having executed the note of October 6, 1910, with an understanding that it was to be renewed, if so desired (and of which understanding there is no foundation in fact in the evidence), and Richards having been notified by Williams of the making of the note of October 6, 1910, and never having repudiated the said first note *to the Bank*, that he was liable on the renewal note notwithstanding he never heard of it until December 28, 1911.

Our position is this: That upon the evidence the only legitimate theory that plaintiff could have proceeded upon was ratification, and that ratification could not possibly have taken place in this case unless Richards having full knowledge of all the facts and circumstances and the claims by the Bank of his liability had remained silent for a considerable space of time and in that way acquiesced; or by some unequivocal statement admitted his liability on the note. The facts developed on the trial show neither of such conditions; in fact, as we claim they show a complete disaffirmance of the note of February 24, 1911, sued on as soon as knowledge of its making was brought to the attention of Richards.

We therefore contend that the Court erred in instructing the jury on its own volition in the following particulars, viz.:

I.

The Court erred in instructing the jury on its own motion that:

“On the part of the plaintiff it is contended that in the latter part of September, 1910, in the Hot Springs Precinct in this Division, the defendants Williams and Richards entered into an agreement of partnership whereby Richards agreed to advance a certain amount of money for the use of such partnership and the defendant Williams agreed to proceed to the Iditarod and to investigate conditions there, and that it was also agreed between them that if it should seem advisable to said Williams, after arriving in Iditarod and after such investigation that he should purchase an interest in a certain lay or lease upon a mining claim on Flat Creek. It is further contended by the plaintiff that Williams did proceed to the Iditarod pursuant to such agreement and did purchase for said partnership an interest in a lay or lease on Flat Creek, and for the purpose of making such purchase did borrow the sum of thirty-five hundred dollars from plaintiff, and on or about October 6, 1910, made and delivered to plaintiff a promissory note therefor, signed by Williams in the name of Williams and Richards.

“Plaintiff further contends that Richards was informed by Williams of this transaction and that he ratified the same and that thereafter on or about the 24th of February, 1911, the defendant Williams executed to the plaintiff the note which has

been introduced in evidence, bearing date on that day, and that the same was given for the money theretofore loaned and in renewal of the note made on or about October 6, 1910, and that this note was executed as the note of Williams and Richards, and that Williams was authorized to execute such note on behalf of the defendant Richards" (Assignment I, Tr., 273-4).

Said instruction is erroneous:

(1) In that it assumes a state of facts and a theory not shown by the record or advanced by plaintiff.

There is absolutely nothing in the transcript to show that in the transaction between Williams and Richards any amount of money was spoken of save the twenty-five hundred dollars which was given Williams by Richards. There is not a scintilla of evidence in the record that Williams was authorized to borrow any money on behalf of Richards or on behalf of the so-called partnership of Williams and Richards. This instruction is misleading in that it holds out to the jury the idea that the contention of plaintiff was that Williams had power in the first instance to borrow money in Richards' name or as a member of the alleged partnership.

Williams was the leading witness for the plaintiff. Out of his mouth we should expect certainly to look for confirmation of any such theory or evidence upon which to base such a statement. What does he testify to?

That when Boulton sent the telegram relative to the

purchase of the quarter interest and that he wanted \$2000.00 right away to protect himself against a freeze out game, he stated therein that a letter was to follow which Williams afterwards received in the Iditarod; that Richards asked him if he would not like to go down there and buy in the interest from Boulton and he responded, "What is the use of me talking, I have not got any money. Those are the words" (Tr., 70-71).

That Williams offered to let him have the money and did give him \$200 in cash, and a \$2300 check (Tr., 73), and he further testified on cross-examination as follows:

"Q. Did you have any conversation with Richards at any time after getting this telegram from Boulton between that and the time you left that you would go down there and buy a quarter interest or any interest with Boulton and take the assignment of the lease in the name of yourself and Mr. Richards?

"A. No sir.

"Q. Did you have any conversation with him or did you have any verbal contract or any written contract that you would go down there and buy into that lease on Flat Creek and that he and you would mine there as *mining co-partners* during the Summer 1911?

"A. No sir.

"Q. Was there anything said between you—now I am talking about down there at Hot Springs and before you left—about any partnership name?

"A. No, there was not.

"Q. Was there anything said about you going

down there and putting that money he had given you in a bank in the name of the partnership of Richards and Williams?

"A. *No sir.*

"Q. Was anything said between you about dividing profits and losses of any business down there?

"A. *No sir.*

"Q. Was there anything said between you about your buying anything at all with that \$2500 other than a quarter interest in the Boulton lease?

"A. I can't say we discussed about buying. *I was just given the money* and sent down there to use my own judgment" (Tr., 79-80).

And before going he expressed his appreciation of the kindness of Richards in giving him this money to go, saying he would do the right thing in return (Tr., 81).

Here is a plain tale that he who runs may read. Not a word as to the advancement of any further money; not a word as to the inception of any partnership, mining or otherwise; not a word as to the operation of any mines together, not a word as to the borrowing of any money or the creation of any liabilities as against Richards. Just another chance given (in addition to the former one in the lay on Cache Creek) by a big-hearted man more fortunate in his mining deals to his less fortunate friend, a chance for him to make good and a possible repayment of the money to Richards in the future with interest.

(2) The said instruction is further misleading in this:

It instructs the jury that the contention of the plaintiff is that "the defendant . . . entered into an agreement of partnership . . .," whereas the allegation of the plaintiff's bill is that a limited or *mining* partnership was entered into as between them.

It could not contend one thing in pleading and another on the trial.

It would be useless to waste the time of the Court by citation of authority that the *allegata* and *probata* must agree and necessarily where the issue raised by the pleadings is as to the existence of a *mining* partnership limited and confined in its character, plaintiff could not in the face of such issue contend that there was a general partnership.

So the Court has in this respect certainly erroneously instructed the jury for no such contention is shown by the transcript.

(3) To further analyze this instruction:

The Court jumps from the proposition of a general partnership agreement (wherein it was the contention of plaintiff, as the instruction asserts, that Williams had been given power to and did in pursuance of such general partnership agreement, borrow some \$3500 and execute the note of October 6, 1910) to a statement that Richards was informed of the making of this note and ratified it. In other words, the Court

instructs that plaintiff's contention is both as to an antecedent power given Williams to borrow the money represented by the note of October 6, 1910, and a subsequent ratification. And then goes on further to instruct as follows as to plaintiff's further contention:

"That thereafter on or about the 24th day of February, 1911, the defendant Williams executed to the plaintiff the note which has been introduced in evidence bearing date on that day, and that the same was given for the money theretofore loaned and in *renewal* of the note made on or about October 6th, 1910, and that *this note* was executed as the note of Williams and Richards and that Williams was authorized to execute such note on behalf of the defendant Richards."

It is difficult at first blush to ascertain what was meant by the foregoing statement—whether plaintiff's contention was that Richards authorized the execution of the note of February 24, 1911, or whether it was the note of October 6, 1910, that Williams was authorized to execute. But upon a second reading it is evident that it was the note of October 6, 1910, that the Court must have intended to refer to, for it was this note that Williams executed in the name of the firm; the note in suit was signed by the individual names, Williams signing as the attorney in fact of Richards, (although stating to Hurley that he had no power of attorney to do so) and also signing the firm name.

And such contention, i. e. that Williams was *author-*

ized to execute the note of October 6, 1910, has as we have shown, no foundation in the evidence, and certainly no foundation in the pleadings, as the making of that note was not in issue, nor did the plaintiff contend on the trial that said note was authorized.

So far as the first note was concerned the testimony is uncontradicted that when Williams reached the Iditarod he deposited the money (\$2000) given him by Richards in the Miners' & Merchants' Bank in his own name; that when he decided to purchase the additional interest of Shively and Kennedy he tried to negotiate a loan with that Bank in his own name; failing in that, he went to the plaintiff bank and informed its president, Hurley, who was familiar with the financial standing of Richards, that he had no power of attorney from Richards but considered him his partner and that he would sign up a note in Richards' name if Hurley would negotiate the loan from the Bank, which upon those facts Hurley agreed to do (Tr., 91-2). Afterwards in a strongly apologetic spirit he wrote Richards a statement of the transaction (Tr., 39), to which letter (received by Richards on December 7, 1910), the latter made reply denying the right of Williams to use his name in the note (Tr., 44).

Later on December 16, 1910, Richards wrote another letter severely criticizing the action of Williams in signing his name to the note, and in that letter stated that he would not be responsible for any note,

check or any other written instrument to which Williams might have signed his name. It is true this letter was not introduced, but it was proven to have been destroyed by Williams and the contents were shown beyond all doubt by Richards and admitted by Williams (Tr., 96, 97, 113, 115-16-17).

All of the foregoing instruction was given by the Court of its own motion. There is not a word as to the issue raised by the pleading which was confined to the making of the note of February 24, 1911. There is nothing in the testimony to warrant the statement contained in such instruction. It is neither based on the issues raised by the pleadings nor upon any evidence in the case.

It is error for the Court to have advanced a contention not based upon any evidence in the case or raised by the pleadings. Such a charge can do nothing but embarrass and mislead the jury. It certainly cannot aid them in determining the real facts but can only lead to mental confusion.

“Instructions must be applicable and limited to the issues raised by the pleadings.”

Vol. 10, *Ency. U. S. Sup. Ct. Repts.*, p. 41;
Brickwood-Sackett Instructions, Vol. 1, Secs.
 170-171;

Vol. 15, *Ency. Pl. & Proc.*, p. 944.

Where plaintiff's case rests upon an alleged positive *misrepresentation* of existing facts, a charge which

assumes that it is based upon a *fraudulent suppression* of material facts, knowledge of which defendant is under some legal duty to disclose, *not being within the pleadings*, is erroneous.

Thorwegan v. King, 111 U. S., 549, 555.

There must be some evidence on which a charge to the jury is founded, otherwise it cannot lawfully be given.

White v. Burnley, 20 How., 235; 15 L. Ed., 886;

Mitchell v. Potomac Ins. Co., 183 U. S., 42; 46 L. Ed., 74.

II.

The Court erred in instructing the jury on its own motion as follows:

"You should consider therefore whether or not the defendants Williams and Richards entered into *any* partnership agreement as alleged by the plaintiff and whether or not, if you find that they did enter into such agreement it was contemplated thereby that the said Williams should have authority to borrow money for the purposes of such partnership and whether or not the moneys borrowed by him from the plaintiff were for such purposes, if you find that a partnership had been formed theretofore between Williams and Richards" (Tr., 275).

Said instruction is susceptible to the same criticism as the preceding one in that it is misleading, again referring to a general partnership, instead of to a mining partnership as pleaded.

There is a wide distinction between a mining and a general partnership.

“A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom *actually engage in working the same.*”

3rd Ed. *Lindley on Mines*, Sec. 797, Vol. 3.

Skillman vs. Lachman, 23 Cal., 199;

Hartney vs. Gosling (Wyo.), 68 Pac., 1118.

The chief characteristic therefore of a mining partnership is a joinder in operating a mining claim. No such joint action was shown here. No pretense was made that Richards had anything to do with the operation of the lease bought into by Williams. When the latter took the assignment of the Shively-Kennedy interest at the time of obtaining the \$3500, while he took it in the name of the alleged partnership, he made a personal note for a balance due Kennedy of \$800, signing his own and not Richards' or the partnership name to the same (Tr., 91-2). In settling up for some of the indebtedness due from Kennedy and Shively he paid the same by his own personal check and not in the name of the alleged partnership or

that of Richards. In purchasing a boiler to be used on the lay, he paid \$700 in cash and gave his personal note to one Aitkin for the balance (Tr., 93). During the summer of 1911, the mining operations carried on quite extensively on the ground were so carried on by copartnership composed of Williams, Boulton, McLennan and Mackenzie. Plaintiff collected large sums of money from this outfit during that summer (Tr., 184-187) and there was no claim made by anybody that Richards had a thing to do with these operations even in a remote degree.

Had there been any evidence of a mining copartnership there would have been no implied authority in Williams to execute the note in controversy by reason thereof. Such authority must have been express or the making of the note must have been necessary in the business of the mining partnership.

In the oft cited case of *Smith vs. Sloan*, 37 Wis., 286, 19 Am. Rep., 757, where the authorities are collected, the well known rule is laid down that one partner in a *non-trading* partnership cannot bind his copartner by a bill or note drawn, accepted or endorsed by him in the name of the firm, nor even for a debt which the firm owes unless he has express authority therefor from his copartner, or unless the giving of such instrument is *necessary to the carrying on of the firm business*, or is usual in similar partnerships; and the burden is upon the holder of the note to prove such authority, necessity or usage.

See also:

Lindley on Partnership, Vol. 1, p. 302;
Hartley vs. Gosling, supra;
Skillman vs. Lachman, supra;
Manville vs. Parks, 2 Pac., 212;
Faires vs. Rose et al., 18 S. W., 418;
Snively vs. Matthewson, 40 Pac., 628.

But the evidence fails to show the existence of a mining partnership. And as appears from the testimony of Williams, quoted under our first specification of error, there was neither a general nor mining partnership agreed upon at Hot Springs as between him and Richards.

It is clear that such instruction is not based on the issues raised by the pleadings, nor upon any of the evidence, and particularly that portion thereof that authorizes the jury to inquire whether any partnership agreement between Williams and Richards contemplated the borrowing of money for partnership purposes and as to whether moneys borrowed from plaintiff were used for such purposes. There was absolutely nothing in the evidence to show any agreement that Williams was given the right to borrow moneys in Richards' name or in the name of any partnership. Such an instruction could only serve to divert the attention of the jury from the real question, i. e., as to whether there had been any ratification of the un-

authorized action of Williams for there certainly was no evidence whatever of any prior authorization.

III.

The Court erred in instructing the jury on its own motion as follows:

"You are instructed that if you find from the evidence in this action that *such* partnership was formed with the defendants and that it was contemplated thereby that Williams should have authority to borrow money for the partnership use, and that such sum of money was borrowed from the plaintiff by Williams for such purposes, and the *notes* above mentioned given to plaintiff therefor, then your verdict should be for the plaintiff."

This instruction is in line with the two preceding ones and subject to the same criticism, and further is indefinite and misleading. The Court says: "You are instructed that if you find from the evidence in this action that such partnership was formed," etc. In the first instruction objected to he states that the plaintiff's contention is (in violation of the pleadings) that a general partnership was agreed upon. In the second instruction he says "You should consider whether Williams and Richards entered into *any partnership* as alleged in the pleadings" * * *. In this instruction they are to find for the plaintiff if they decide from the evidence "that *such* partnership" was formed. What partnership? The general one contended for as the Court states in the first in-

struction, or the mining partnership set up in the pleadings?

It is impossible to state. We can but reiterate that by the chief witness offered by the plaintiff (Williams), who voluntarily came without subpoena 1,000 miles to testify (Tr. 135), it was conclusively shown no general partnership was entered into; the evidence showed conclusively no mining partnership was carried on as between them. In fact, no partnership of any character was shown.

Furthermore, the issue tendered by the complaint was as to the making of the *note* of February 24, 1911. It will be remembered that this *note* was signed in the individual name of Richards by Williams as his attorney in fact, admittedly without any power of attorney by Williams to act for Richards or sign his name. Conceding for the purpose of the argument that Williams might have had power to make the original note of October 6, 1910, (although none is shown by the record) yet it did not follow that he would have power to make the note given as is claimed in renewal and sign Richards' name thereto. There is nothing to show that any renewal of the first note was ever contemplated, even as between the plaintiff and Williams.

Conceding *pro argumenti* that Richards was liable on that note, plaintiff should have pursued his remedy on that note or hold Williams alone liable on the second note, for the evidence shows that at the time of

the making of the note sued on, the partnership, if any can be said to have existed between Williams and Richards had been dissolved, so that in this respect the Court obviously erred when it instructed as to the "notes."

The first note came due in January, 1911. On cross-examination Williams was forced to admit that he had received a letter from Richards, subsequently destroyed (the letter of December 16, 1910) and testified in regard thereto as follows:

"Q. You will not deny that he (Richards) used this very language I have read in that same letter, will you? 'I will not be responsible for any notes or whatever else you have signed my name to. Let me know as soon as possible if you have revoked the same?'"

"A. I cannot admit it.

"Q. You will not deny that he used language similar to that?

"A. I admit he used language—the chances—I admit there might have been a sentence in it to that effect, but I do not know that those were the words that Richards wrote to me and that I received * * * (Tr. 97).

* * "Q. You gave this note in suit here (the last note, February 24, 1911) didn't you?

"A. Yes, sir.

"Q. That is going on two months after, isn't it?

"A. Yes, two months.

"Q. Did you have any conversation with Hurley in the meantime?

"A. *I think I went into the Bank one day and told him I had not got the money and Mr. Rich-*

ards said he would not do any more at present.
 * * * some time after the note was due (Tr.
 99-100) * * *.

"Q. Mr. Hurley was either talking to you or sent you word that you had to do something with this debt of \$3500, didn't he after it became due?

"A. Oh, yes, I was informed.

"Q. How were you informed?

"A. *I had to make a change when Richards didn't want to go into it—didn't want to stay in the transaction—and I told Mr. Hurley that under the conditions I would have to get some other partner in.*

"Q. When did you tell Hurley that?

"A. Some time in February, I suppose (Tr.
 100-102) * * *.

"Q. Didn't he (Hurley) tell you he was willing to release Richards if you would give a new note and give a mortgage on that lay over there on Flat Creek?

"A. I understood that when I got the bill of sale from Mr. Richards that there was to be another transaction take place and that would release Mr. Richards of all obligations. * * *

"Q. You told Hurley you would do that?

"A. I told him I would.

"Q. When?

"A. Some time in February.

"Q. Did you send a form of bill of sale and transfer up here to Hot Springs for Richards to sign, conveying his interest in that three-quarters interest in the lay back to you?

"A. Yes, sir.

"Q. That was before this note in suit was signed at all * * *?

"A. *I can't recollect whether it was just before or just about the same time*" (Tr. 102) (See also Tr. 53; 103-4).

At this time Williams was making arrangements with McKenzie and McLellan to buy an interest in the ground; of this Hurley had knowledge. Accordingly on April 4, 1911, he wrote to Richards:

"Well, Dick, I assumed the responsibility of this proposition, *doing as you advised me to do—consider you out of it.* (See letter from Richards to him of December 26, Tr. 52). I was compelled to sell half interest to secure note I gave last fall. In purchasing the bill of sale recorded in yours and my name, but I cannot cancel the note till you send me the bill of sale which you will find enclosed. Then you will be relieved of all obligations in connection with the proposition. Angus McKenzie and Angus McLellan are the parties I sold to. * * * Kindly send the enclosed bill of sale, so that I can relieve you of all obligations. *If you want some security for the money you gave me, I can give you the quarter interest which I still hold.* Hoping this will be satisfactory to you" (Tr. 124-5).

and acknowledging receipt of the deed from Richards, wrote on June 27, 1911,

"The Guggenheims are in camp. They have options on most of Flat Creek. We let them an option for \$33,000. * * * Should they take it up *I will come direct to the Springs and make good.*"

There can be no doubt that Williams and Richards understood and intended that the partnership, if any existed or any interest that Richards had in the trans-

action relative to this lease was terminated at the time that he wrote the letter of December 8, 1910—

*“Regarding that account at the Bank in both our names, that is certainly a mistake, when I give you the check for the money and you gets a letter of credit on it, my name should not be used at the Bank. I never had the least idea you should assume any obligations beyond what would relieve the situation, and what Jack called for at the time, and now when I see Jack gets some of the money himself and takes to the woods. And whatever became of that letter he was sending, never showed up here as yet. Well now Ed, to make this short, I believe the best way out of this, you should try and get some of those moneyed fellows down there to go in with you. Consider me out of it altogether. * * * If you manipulate another deal, it would be better for you to have the bill of sale made over from the old laymen. I sincerely hope you will make out all right, you are perfect welcome to use that money until you can make it. * * * Kindly let me know if you make out all right. It seems to me you could easily make some transaction to advantage on that kind of ground. I don’t care to go any more” * * * (Tr. 45-6).*

This letter conveyed plainly enough to Williams the attitude of Richards towards the transaction, and he thereupon told Hurley as we have shown above, when Hurley was pressing him for payment that Richards would do no more and he must get new parties into the transaction.

Yet in view of this thorough understanding on Williams’ part and his expression of the facts to Hurley

relative thereto, and of the fact that he had no power of attorney from Richards to sign his name, Hurley consented on behalf of the Bank to take a new note from Williams signed in the alleged partnership name the latter agreeing to sign Richards' name to the note also by himself as attorney in fact, Hurley stating he would take a chance on it turning out all right, although it was not business.

Can it reasonably be held in view of those facts that the note in controversy was the note of the mining partnership conceding as we have stated for purposes of argument there had been in the first instance such a partnership? And going further and admitting authority specially given to Williams to borrow in the first instance?

The very fact that Williams signed the note in controversy in the individual name of Richards and not in the partnership name alone as in the case of the first note shows that he recognized the partnership to be at an end and also "took a chance" that Richards in his friendliness toward him might recognize the liability notwithstanding the letter above referred to introduced in evidence and the destroyed letter of December 16, 1910 (contents of which were proven) repudiating any liability on any instruments in writing made in his name by Williams.

Dissolution operates as a revocation of all authority for making new contracts. It does not revoke the

authority to arrange, liquidate, settle and pay those created.

1 *Daniel Negotiable Instruments*, Sec. 370.

Where a note is issued by a partner after dissolution it will not bind the other partners even though given for a debt due by the firm.

1 *Daniel Negotiable Instruments*, Sec. 371;
Whitman vs. Leonard, 3 Pick. (Mass.), 177;
Bank vs. Humphreys, 1 McCord, 388;
Woodson vs. Wood, 5 S. E., 277;
White vs. Tudor, 76 Am. Dec., 126;
Palmer vs. Dodge, 62 Am. Dec., 271;
Rhodes vs. Amsinck, 38 Md., 354.

IV.

The Court erred in instructing the jury of its own motion as follows:

"In case you should find that such copartnership was not formed between the defendants, or that Williams was not authorized to borrow money for partnership purposes, or that the money loaned by the plaintiff was not for partnership purposes, then you should consider whether or not the defendant Richards was informed of the transaction between Williams and the plaintiff, and whether or not the defendant Richards, after having been fully informed of such transactions, ratified the same.

"You are instructed that if you find that the defendant Richards was fully informed of the transactions between the plaintiff and Williams, and

that said sum of money was loaned by the plaintiff to Williams for the use of Williams & Richards, and that on or about October 6, 1910, the defendant Williams executed the note to the plaintiff for said sum of money and signed thereto the name of Richards, or the firm name of Williams & Richards, and that Richards, having been fully informed of these transactions, ratified the same, that then such ratification of the acts of Williams by Richards would have the same effect as if authority to perform such acts had previously been given by Richards to Williams. And, if you find that said acts of Williams were so ratified by Richards, then your verdict should be for the plaintiff, provided you also find that the note in issue was given as a renewal of the note of October 6, 1910, and in consideration of the loan originally made."

It is difficult to point out any one phrase or portion of this instruction as error. It is the instruction as a whole that is misleading and vicious. It assumes a theory of the case not based on the pleadings, not advanced by the plaintiff and not founded on any evidence given at the trial. We think this is apparent from what we have said as to the three preceding instructions. The vice consists in the practical assumption by the Court that there was evidence going to show that Richards authorized Williams to borrow money for the so-called partnership. No evidence of any such authorization is attempted to be shown in the record. We submit that all three and each of these instructions constitute reversible error, for it is impossible to ascertain whether the jury based their

verdict upon prior authorization or subsequent ratification upon which they were instructed by the Court.

V.

The Court erred in instructing the jury on its own motion:

“You are instructed that if you find from the evidence in this case that, subsequent to the time when Williams borrowed from the plaintiff herein the monies for the recovery of which this action was brought, he communicated fully such facts to the defendant Richards, and informed him that the said monies so borrowed in the name of Richards & Williams were to be used in their joint enterprise, and that said Richards did not, on receipt of such information within a reasonable time notify the plaintiff in this action that he was not a partner of defendant Williams, or repudiate the acts of Williams, that such failure to so notify the plaintiff may be considered by you as evidence of ratification of the acts of Williams by Richards.”

This constitutes error in that the Court singled out a vein of evidence and informed the jury that they could consider the same as an act of ratification, casting upon Richards in said instruction a duty to notify the Bank of the repudiation of Williams' action in signing his name to the paper, whereas it was the duty of the plaintiff to notify Richards of the act of Williams in signing his name to the note in suit, and thus give him an opportunity to affirm or disaffirm the same.

The pleading sets up obligations arising out of a mining partnership, under which even if the existence thereof had been proven no right to borrow money would be presumed. Therefore the plaintiff should have been on its guard in treating with any member thereof financially as to his authority to act.

It is provided by Chapter 64, Section 21 of the Session Laws of Alaska (1913) relating to negotiable instruments that—

“A signature by ‘procurator’ operates as notice that the agent has but a limited authority to sign and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.”

The plaintiff proved out of the mouth of its own President that Williams had no power of attorney to sign the name of Richards to the note in controversy (Tr. 180). Why then should the onus be cast on Richards to notify the Bank that Williams had no power to act when the Bank already knew it? Under the section of the Alaska laws just quoted the fact that Williams signed as attorney in fact should immediately have put plaintiff upon inquiry as to the extent of his power, and imposed upon IT the duty of notifying Richards of the action of Williams, when as Hurley testified he “never understood” that Williams had any authority to sign Richards’ name (Tr. 180).

“The borrowing of money and the giving of negotiable paper is not a necessary or an ordinary

incident of the business of a non-trading association, and when it happens that such a concern does desire to borrow or a member or officer proposes to give or tenders a promissory note in its name, *it is no hardship upon the lender or creditor to require him to look into the authority of one who proposes to bind others who are not present or consenting.*"

Schumacher vs. Sumner Tel. Co., 142 N. W.,
1034-1037.

See also:

Anderson vs. Kissam, 35 Fed., 699-706;
Coulter vs. Port. Trust Co., 26 Pac., 565.

Further, the Court erred in giving this instruction in that it gave undue prominence to a part of the evidence only, and did not direct the jury to consider the same in connection with the balance of the evidence.

See:

Kimmel vs. Nagele, 84 Ill. App., 22 (25),

holding erroneous an instruction that "if you find
"from all the evidence in this case that the plaintiff
"purchased such notes at a discount of — per cent.,
"then you have a right to take this fact into considera-
"tion in determining whether or not plaintiff pur-
"chased said notes in good faith or not," the Ap-
pellate Court of Illinois said:

"This instruction was erroneous because it singled out and gave undue prominence to part of the

evidence only, and did not tell the jury that the same should be considered together with all the other evidence in the case."

See also:

Sprague's Collection Agency vs. Spiegel, 107

Ill. App., 508-270;

Vol. 7 *Ency. U. S. Sup. Ct. Rep.*, p. 42;

Richelieu etc. Nav. Co. vs. Boston Marine Ins.

Co., 136 U. S., 408, 423;

Hickory vs. United States, 160 U. S., 408.

Again, it appeared, as we have heretofore shown, that the partnership, if any can be said ever to have existed, was terminated by Richards, who had theretofore declined to go any further. This fact was known to the officers of the Bank. No partnership or other relation then existing as between Williams and Richards it was not incumbent upon him to have taken any action relative to the note sued upon. Williams in the signing of this note in Richards' name, acted as a mere volunteer and no duty existed upon Richards' part to repudiate his action upon its being brought to his notice, a positive affirmation being needed to make it binding upon him.

Mechem on Agency, Section 160.

But assuming for argumentative purposes only that Williams was the agent of Richards to a limited extent, and Williams had exceeded his authority in the

manner shown by the facts of this case, it was not the duty of Richards upon learning of the violation of his limited authorization, to seek the Bank and give it notice of his repudiation. His omission to do so or his mere silence would not be construed as a ratification of the note.

White vs. Langdon, 30 Vt., 599.

As a matter of fact as soon as knowledge of the making of the note in suit was brought home to Richards, by a letter from the Bank received December 28, 1911, while he was in California, he wrote to the Bank repudiating the action of Williams. This letter, dated January 2, 1912 (Tr. 208) was ruled out, but Richards further testified that when he reached Fairbanks in March, 1912, he personally called on Hurley at the Bank and reiterated his repudiation of the note (Tr. 211-245).

In giving the foregoing instructions the Court did not tell the jury that it was to consider the line of evidence therein set forth *in connection with all the other evidence in the case*, but by placing such undue prominence thereon must have impressed upon the minds of the jurors an importance in connection therewith entirely out of proportion to the facts and the law applicable thereto.

VI.

The Court erred in instructing the jury on its own motion that:

"You are instructed that it was not necessary for Williams to have authority to bind Richards in the giving of the note sued on in this action before the execution of the same, provided you find that Richards thereafter ratified the acts of Williams.

"And you are further instructed that such ratification need not be expressed in writing. But his failure to disaffirm the acts of Williams within a reasonable time, or to repudiate the actions of Williams and notify the plaintiff thereof in this action within a reasonable time, may be held to constitute a ratification of the acts of defendant Williams so that the defendant Richards will then become liable for such indebtedness. Of course, an act of ratification, either by failure to protest, or by express affirmative acts, implies that the party had full knowledge of such acts as had been done by his agent; and, unless he had such knowledge, he would not be held to have ratified them by any failure to act or disaffirm them. Ratification means a confirmation of an act previously done by another."

The Court instructed the jury as above upon a theory of the case entirely absent from either the pleadings or the issues made in the case.

The complaint sues the defendants as partners and alleges the existence of a *mining* partnership as between Williams and Richards, the borrowing of \$3500 by *them* and the making of the note sued upon,

signed in the alleged firm name as well as in the individual names of the parties.

The answer of Richards denying all of these allegations, the only issues raised were as to the borrowing of the moneys alleged to be the consideration for the note sued on, the existence of a mining partnership and the making of the note of February 24, 1911. There was no issue as to ratification. There was a total failure to prove the mining or any partnership. There was a total failure to prove prior authorization from Richards to Williams to borrow the money, to sign the first note in the partnership name or to sign the note in controversy in his individual name or otherwise.

As a forlorn hope the plaintiff directed its forces to proving ratification of the action of Williams, and the Court below evidently adopting the attitude of the plaintiff, sought by this and the other instructions complained of on this point, to urge upon the jury the fact that there had been ratification. For it says in terms after instructing that the ratification need not be in writing—*“but his failure to disaffirm the acts of Williams within a reasonable time or to repudiate the action of Williams and notify the plaintiff thereof in this action within a reasonable time, may be held to constitute a ratification of the acts of defendant Williams so that the defendant Richards will then become liable for such indebtedness.”*

The principle seems to be settled that where one

assuming to act as agent has no *actual* authority, subsequent mere silence on the part of the principal, or his failure to repudiate, cannot as a matter of *law* (as distinguished from the question of *fact*) create any liability. The significance of such silence or failure to repudiate does not concern estoppel or creation of ostensible agency based upon estoppel. Ostensible agency or estoppel only applies when the antecedent negligence of the principal gives rise to belief in the mind of a third party that the agency exists, which belief must be so caused and present when the business is done.

Mere subsequent silence, or failure to repudiate an unauthorized act of agency, can concern only ratification. Ratification is a question of fact (i. e. the intention of the principal) for the jury and not of law for the Court. It is true that after the principal learns of the unauthorized act his failure to repudiate may be a *fact* proper to be considered by the jury in connection with *all the circumstances of the case*, in reaching this determination of the question of fact as to whether or not there has been a ratification. In *law* there is no duty incumbent upon a principal to disaffirm an unauthorized act. It is only when the failure of the principal to disaffirm becomes, in the light of *all* of the principal's conduct, an affirmative factor or fact from which the jury may infer the intention to ratify, that silence has any significance, and then not because of any duty of the principal to disaffirm.

There is not a scintilla of evidence in this case showing any failure of Richards to repudiate the action of Williams in the making of the note sued on, as we have hereinbefore shown. On the contrary, it appears that he received the bank's notice on December 28, 1911, and answered repudiating Williams' action therein on January 4, 1912, and when he reached Fairbanks in March of that year, called on the bank and again repudiated the action of Williams.

This instruction is specially vicious in that the Court does not qualify the aforesaid statement to the jury by "should you find a failure to disaffirm the acts of Williams . . ." but says in terms, his failure to disaffirm within a reasonable time may be held to constitute a ratification, expressly stating that there was a failure, and does not state that a failure *if found* is *a fact* to be considered in connection with *all* the other evidence in the case concerning the making of the said note.

The instruction of the Court that mere silence would in this case warrant an inference of intention to ratify, places the Court in the position of invading the province of the jury; but the jury decides what inferences are to be drawn from evidence, not the Court, and the jury must consider silence in conjunction with all the facts of the case in considering whether the inference of intention to ratify should probably be drawn.

"Ratification takes place when one person adopts a contract made for him, or in his name, which

is not binding on him because the one who made it was not duly authorized to do so. *Ratification is a question of fact*; and, in the great majority of instances, turns on the conduct of the principal in relation to the alleged contract or the subject of it, from which his purpose and intention thereabout may be reasonably inferred. Story, Ag. Secs., 253-260. And, generally, deliberate and repeated acts of the principal, with a knowledge of the facts, that are consistent with an intention to adopt the contract, or inconsistent with a contrary intention, are sufficient evidence of ratification."

Oregon Ry. Co. v. Oregon Ry. & Nav. Co.,
28 Federal Rep., 507.

The distinction between a contract intentionally assented to or ratified in fact and an estoppel to deny the validity of the contract is very wide. In the former case the party is bound because he is intended to be; in the latter he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treat him as legally bound. In the one case the party is bound because the contract contains the necessary ingredients to bind him, including a consideration. In the other he is not bound for these reasons, but because he has permitted the other party to act to his prejudice under such circumstances that he must have known, or be presumed to have known, that such party was acting on the faith of his conduct

and acts being what they purported to be, without apprising him to the contrary.

Forsyth v. Day, 46 Me., 176.

Under the facts of this case no estoppel can be said to have arisen as against Richards, for the bank from the outset negotiated with Williams only and knew that Williams had no authority to act for Richards in borrowing the money *originally* to purchase the additional interest in the lease. No benefit is shown to have flowed to Richards from the acts of Williams and there is nothing to show that the bank was influenced by any act or conduct of Richards in entering into the *original* contract of loan or that it suffered any detriment or prejudice by reason of any such conduct or acts.

VII.

The criticism, authorities and argument advanced against the two preceding instructions is also applicable to the instruction assigned as Specification of Error VII. It would be trespassing upon the patience and time of the Court to reiterate the same.

VIII.

The Court erred in refusing to give in full the following special instruction requested by the defend-

ant Richards, and in giving only the first two paragraphs thereof:

"The Court instructs the jury that a mining partnership can only exist where several parties cooperate in working mining property; mere ownership as tenants in common, either of the mining ground itself or a leasehold thereon, not being sufficient.

"Where a mining copartnership is shown to exist within the definition above given, each partner has power to bind his copartners by dealing on credit and the giving of promissory notes for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; but one mining copartner has no implied power or authority to borrow money and sign the firm name to a promissory note as evidence of such loan, where the money is to be and is used in purchasing mining ground or interests therein or assignments of leases thereon, and if he does so without the knowledge or consent of his copartners they are not liable thereon.

"Applying the law as given above to the testimony in this case, I charge you that if you find from the testimony that no mining co-partnership existed between the defendants Edward Williams and Edwin Richards on the 24th day of February, 1911, the date of the note which is the subject of this action; or if you find that they were on and before said day such co-partners but that the money evidenced by the said promissory note was, on or before that date and without the knowledge or consent of the defendant Edwin Richards, borrowed by the defendant Edward Williams from the plaintiff bank, for the purpose of being used in the purchase of an interest in a lease on Flat Creek in the Iditarod country and that said money was

so used, then in either event the defendant Edwin Richards is not liable upon the said note; unless afterwards, with full knowledge of all the material facts connected therewith, he ratified the making and signing of the said note by the said Edward Williams. The word 'ratification' means a confirmation of a previous act done by another."

The error of the Court in giving only the abstract proposition of law advanced in the first two paragraphs in the foregoing proposed instruction without applying it to the evidence in the case as requested, is apparent, because the latter was a plain, unbiased and pertinent statement of the evidence as shown by the transcript. The defendant was entitled to this full instruction, for an abstract proposition of law, no matter how correct, not being applied to the evidence leaves the jury in doubt as to how it should be applied and the benefit of the law applicable to the case is thus lost.

The Court in its prior charge had instructed as to the existence of a general partnership between the defendants the duties and liabilities of which being entirely different from those of a mining partnership, and had referred to certain concrete evidence in discussing the formation of such general partnership. (See Assignments of Error, I, II, III, IV.) Giving then these later abstract propositions of law, on what constituted a mining partnership, confusion is likely to have resulted in the minds of the jury and they thus

had been misled in considering these later instructions, unapplied to any of the facts in the case.

The presentation of the instruction proposed in the skeletonized form given instead of in the fair application to the evidence requested by defendant constituted error.

“An instruction is not only required to state correct legal principles but it should so state them that the jury may be able to apply them to the particular evidence to which they are germane.”

Abbitt vs. Lake Erie etc. Co., 150 Md., 498.

“When the evidence tends to prove a certain state of facts, the party in whose favor it is given has a right to have the jury instructed on the hypothesis of such facts and leave it to the jury to find whether the evidence is sufficient to establish the facts supposed in the instruction. *If the instructions are pertinent to any part of the testimony they should if correct be given without regard to the amount of evidence to which they apply.*”

Vol 1 *Brickwood Sackett Instructions*, p. 160.

IX.

The Court erred in refusing to give in full the following special instruction to the jury requested by the defendant Richards and in giving only the first paragraph thereof:

“The Court instructs the jury that the naked declaration or representation of one person that another person is his mining partner or that he is

that other's agent with authority to sign promissory notes by reason of such co-partnership, is not evidence of a mining partnership or agency, as against such other person.

"Applying the foregoing rule of law to the testimony in the case, if you find therefrom that on or about the 6th day of October, 1910, at Iditarod City and at the time the note of that date for \$3,500.00 was signed by the defendant Edward Williams in the name of 'Richards & Williams' as shown by Plaintiff's Exhibit '5,' the said Williams declared and represented to C. J. Hurley, manager of the plaintiff bank, that he and the defendant Edwin Richards were mining co-partners, and for that reason he was authorized to borrow money and sign the firm name 'Richards & Williams' to a promissory note for the amount of money so borrowed, then I charge you that under such circumstances the said Hurley, acting for said bank, had no legal right to rely solely on such declaration or representation and if he did so it was at the peril and risk of the plaintiff bank. Under the conditions stated above it would have been the duty of the officers of the bank to make other and independent inquiries as to the truth of the statements made by Williams, and if you find from the evidence that the said officers failed to make such inquiries and that Williams was not at the time a mining co-partner with Richards and was not authorized to sign the note, the bank must bear the loss, if any, and not the defendant Edwin Richards.

"The Court further instructs the jury that all that is said above with reference to the note, Plaintiff's Exhibit '5,' applies with equal force to the note, Plaintiff's Exhibit '6,' made the basis of this action and copied in the body of the complaint, so far as the liability of the defendant Edwin Rich-

ards is concerned, growing out of the signature thereon 'Richards & Williams.'

"The note in action (Plaintiff's Exhibit '6') is also signed by individual names as follows: 'Edward Williams, Edwin Richards by Edward Williams, his attorney in fact.' With reference to such signatures, you are instructed that as the name of defendant Edwin Richards purports on the face of the note in action to have been signed by Edward Williams under the authority of a power of attorney, but the evidence conclusively shows that he had no power of attorney or other written authority to sign said note for defendant Richards, it follows that the plaintiff cannot recover against said Richards by reason of such individual signatures unless you should further find from a preponderance of the evidence that the defendant Edwin Richards, after full knowledge of all the material facts connected with the signing of the said note, ratified the action of the said Edward Williams in the execution and delivery thereof."

In this respect the Court gave the abstract proposition of law embodied in the first paragraph, but as in the specification of error just argued, refused to apply it to the evidence as requested. A reading of the evidence to which it was desired the Court should apply the said proposition of law will show its pertinency and tendency to establish the defense of Richards. The authorities cited to this point under Specification of Error VIII are equally applicable here.

The defendant was certainly entitled to an instruction along the lines proposed,—that Hurley acting for the Bank should have been on his guard, should not

have relied upon the representations of Williams as to Richards; and that it was the duty of the officers of the Bank to make independent inquiry as to the truth of such representations, and that if the jury found that Richards was not the mining partner of Williams at that time and was not authorized to sign the note, the Bank should bear the loss. Such an instruction states the correct rule of law.

Schumacher vs. Sumner Tel. Co., supra;
Anderson vs. Kissam, supra.

Assuming Williams to have been the agent of Richards, it is yet the rule that

“Parties dealing with an agent assuming to be authorized to draw, accept or endorse negotiable paper must see to it that his authority is adequate and both they and the agent must keep strictly within the limits fixed by the agent’s authority or the principal will not be bound.”

Mechem on Agency, Sec. 393.

And again says Mechem, in his work on *Agency*, Sec. 706:

“Every person dealing with an assumed agent is bound *at his peril* to ascertain the nature and extent of the agent’s authority. The very fact that the agent assumes to exercise a delegated power is sufficient to put the person dealing with him on his guard to satisfy himself that the agent really possesses the pretended power.”

In the case at bar Williams had no express authority whatever to borrow the money represented by or to sign the original note or the so-called renewal note in suit. That may be said to be admitted (Tr. 180) and certainly no implied authority from the fact that he stated *he considered* Richards his partner and the evidence is clear that Richards had absolutely nothing to do with the operations of the mine.

If by any process of tortuous twisting of the facts of this record we could find authority in Williams to execute the first note, that surely would give him no power to renew the same.

Mechem on Agency, Sec. 393.

Ward vs. Bank of Kentucky, 7 T. B. Mon. (Ky.), 93.

And certainly the balance of said proposed instruction viewed in the light of the evidence, stated a correct proposition of law.

X.

The Court erred in refusing to give the following instruction asked by defendant Richards:

“Where a promissory note is signed by one person for another, as that other’s attorney in fact, as the note copied in the complaint was, the one taking such note is put on his guard by the form of the signature and is bound to inquire whether the person so assuming to sign for such other, in fact held a power of attorney or other written authority to so

act, and if it turn out that he did not have such written authority the note is void as against such other.

"Applying the foregoing rule of law to the testimony in this case, if you find from the evidence that the defendant Williams on February 24, 1911, did not have a power of attorney or other written authority from the defendant Richards authorizing him to sign the name of the defendant Richards to promissory notes, then the action of the said Williams in signing the note was ineffectual to bind Richards and he would not be liable for the payment thereof; unless you should further find from a preponderance of the evidence, that, after being fully informed of all the facts in the premises, he ratified the action of Williams in signing his name to the note."

There was nothing in the charge of the Court covering the same ground set forth in the foregoing proposed instruction and the jury were certainly entitled to be instructed as to the legal effect of a note signed by one individual in the name of another without that other's authorization so to do, especially when the evidence shows that when the note of February 24, 1911, was signed by Williams in Richards' name he expressly stated that he had no power of attorney to act for Richards nor any other written authority. The Bank through its President Hurley, was fully aware of this fact. Hurley testified as follows:

"Q. When you made that second note and mortgage, you were told distinctly then that this man

Williams did not have any power of attorney or any written authority from Richards?

"A. Certainly. I never understood that he had" * * * (Tr. 180).

It would not seem to require any citation of authority other than those heretofore called to the attention of the Court to show the correctness of the legal proposition advanced in the foregoing instruction, based as it is upon pertinent and competent testimony in the record.

XI.

The Court should have admitted in evidence the letter from Williams to Richards dated June 27, 1911, Defendant's Ex. 3, Tr. 126-7 (Assignment of Error XI).

A) This letter should have been allowed to go to the jury in connection with the letter of Williams of April 4, 1911, Defendant's Ex. 2, (Tr. 124-5) wherein Williams wrote to Richards enclosing the bill of sale of any interest that Richards might be said to have in the ground covered by the lay by reason of its having been made out jointly in his and Williams' name by the act of Williams. In that letter Williams assured Richards that when the bill of sale was returned Richards would "be relieved of all obligations in connection with the proposition." And further assured him that *"if you want some security for the money you*

gave me I can give you the quarter interest which I still hold" (Tr. 124-5).

The letter of June 27, 1911, is complementary to the letter of April 4, 1911, for in it Williams acknowledges receipt of the return of the deed from Richards.

"I must thank you for sending me the deed" (Tr. 126), expresses worry that it might have been lost because of the delay, and then to show his anxiety to repay Richards the money he had loaned him, goes on to state that—

"The Guggenheims are in camp—they have options on most of Flat Creek. We let them an option for \$33,000. They also take all machinery and wood at cost price and also pay all running expenses if they take it up, which expires August the first. * * * *Should they take it up I will come direct to the Springs and make good*" (Tr. 127-8).

These letters taken together tend to throw light upon the true relations existing between the defendants Williams and Richards and serve to weaken the attempted proof that Richards was familiar with the making of the note in controversy and by acquiescence ratified the same. There is nothing in the letter of April 4, to show that any new note had been made. On the contrary Williams says:

"Well, Dick, I assumed the responsibility of this proposition, doing as you advised me to do; consider you out of it. I was compelled to sell half interest to secure the note I gave last fall. In pur-

chasing it last fall I had the bill of sale recorded in yours and my name, but I cannot cancel the note till you send me the bill of sale which you will find enclosed. Then you will be relieved of all obligations in connection with the proposition. Angus McKenzie and Angus McLellan are the parties that I sold to. I got \$4500 for the half interest in the lay—just enough cash down to pay the back interest on the note—\$400 and giving a mortgage till July 1st, 1911" (Tr. 124).

Not a word as to a new note signed in the individual name of Richards! And in fact, Richards never heard of this new note until December, 1911, in San Francisco, (Tr. 206) long after the receipt of the letter of April 4, 1911, and long after the return of the deed evidenced by the letter of June 27, 1911, which the Court ruled out.

As the question of Richards' ratification of the note in controversy by silence was the subject of a portion of the charge of the Court, the letter of June 27, 1911, was peculiarly competent testimony, taken in connection with the letter of April 4, 1911, to show that no knowledge of the actual facts concerning the making of the note in controversy was brought home to Richards until long after the making of the same, for if he had knowledge that Williams had used his name in making the note sued on, he would hardly have also re-conveyed to Williams whatever interest he had in the ground in addition to making himself liable on the note. Therefore the fact that this deed was re-

turned to Williams and so acknowledged by him was of moment as well as Williams' promise to go direct to Hot Springs and make good the moneys Richards had given him.

XII.

The Court should have admitted the letter written by the defendant Richards to the Bank, dated January 2, 1912 (Defendant's Ex. 6, Tr. 286).

This letter was written immediately after the first notification that Richards had of the making of the note in controversy, and in which he repudiated the same in terms. There is nowhere in the record any evidence that Richards ever had any knowledge of this note of February 24, 1911, until as he says he got a letter from the Bank on December 28, 1911, when he was in San Francisco, notifying him that it had been made and demanding payment (Tr. 240). There is no contradiction of this fact. Some effort was made to show that Williams conveyed that information to him in the letter of April 4, 1911, (Tr. 124) but a reading of that letter will show that all reference to the making of the new note of February 24, 1911, was carefully and prudently omitted. So that Richards' testimony remains unshaken as to his entire lack of knowledge until his belated receipt of the notice from the Bank on or about December 28, 1911, in San Francisco, where it had been forwarded to him, and to which he replied almost immediately on January 2,

1912, repudiating the note and the action of Williams. That this letter should have gone to the jury there is no question. The Court afterwards instructed the jury that the effect of "the failure of Richards to disaffirm " the acts of Williams within a reasonable time or to " repudiate the actions of Williams and notify the " plaintiff thereof in this action within a reasonable " time may be held to constitute a ratification of the " acts of defendant Williams so that defendant Rich- " ards will then become liable for such indebtedness," (Assignment of Error VI, Tr. 279) yet Richards is deprived of the only means of showing actual disaffirmance and repudiation to the Bank of the action of Williams in making the note within a reasonable time after knowledge of the material facts was brought home to him, by the action of the Court in excluding his letter to the Bank of January 2, 1912.

We submit the error of the Court in this respect seems too plain for argument and the same was vital to the defendant Richards for, upon the withdrawal of this evidence from the consideration of the jury, may have hinged its decision in arriving at a verdict against him for failure to disaffirm within a reasonable time, and a ratification have therefore been assumed.

In conclusion we submit that for the errors argued, the judgment of the Court below should be reversed. This case is unique in that there was absolutely proven out of the mouth of the plaintiff's witness Williams, that there was no partnership of any kind or character

existing as between him and Richards, yet a judgment is rendered against defendant Richards as a member of such non-existent partnership! It was also proven out of the mouth of the plaintiff through both its witness Williams and its President Hurley, that the plaintiff bank had full knowledge that Williams had no power or authority to sign the name of Richards to the note of October 6, 1910, or to the note of February 11th, 1911, sued upon. Furthermore, as we have shown, the evidence is uncontradicted in the record that Richards had no knowledge of the making of the note sued on until December 28, 1911, and immediately repudiated the making of the same to the Bank by letter four days later. Yet the Court, after ruling out the letter of repudiation, instructed the jury that Richards' failure to disaffirm within a reasonable time was a ratification! Therefore a judgment is rendered against Richards individually also on this note! Certainly a judgment based on such a record of evidence and such a charge of the Court should not be allowed to stand.

We respectfully ask that for the reasons given, the said judgment be reversed.

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Of Counsel.

No. 2440

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWIN RICHARDS,

vs.

AMERICAN BANK OF ALASKA

(a corporation),

Plaintiff in Error,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR,
on Motion to Dismiss and to the Merits.

CHARLES J. HEGGERTY,

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Of Counsel.

Filed

APR 2 1916

F. D. Monckton,

Clerk.

Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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This brief will be divided into *two* parts: *First*, on the *motion* of defendant in error to *dismiss* the writ of error; and *Second*, on the *merits* of the appeal of plaintiff in error.

I.

MOTION TO DISMISS.

This is a *writ of error* sued out by the defendant Edwin Richards, in an action *at law* brought by the American Bank of Alaska against Edward Williams and Edwin Richards as mining co-partners under the name of Richards & Williams (Tr. 4).

The *defendant* in error has moved to dismiss the writ of error upon the ground that the judgment, to reverse which the writ of error was sued out, is a *joint judgment* (Tr. 17-19) against the plaintiff in error Edwin Richards *and* his co-defendant Edward Williams, *co-partners* as Richards & Williams, and against Edwin Richards and Edward Williams as individuals; that the plaintiff in error *alone*, and without petitioning for or obtaining a severance or giving any notice to his co-defendants Williams or the partnership of "Richards & Williams", sued out and had allowed the writ of error and alone assigned errors on said writ; that there was no severance ever requested or ordered to enable or permit *Richards* to sue out and prosecute the writ of error without his co-defendants Williams or the partnership of "Richards & Williams" joining therein; that Rule 63 of the District Court of Alaska to which the writ was sued out, requires such petition for severance *and* notice to the co-defendants; that the *record* here does not nor does the *praecipe* therefor (Tr. 1-2), show any notice to the defendants Williams or the partnership of "Richards & Williams" of or that they refused to join in the writ of error, or that a severance was ever applied for, ordered or obtained; and that this Court has not and never obtained jurisdiction of said cause and judgment upon this writ of error and is without jurisdiction to hear or determine the cause on writ of error (see Typewritten Motion to Dismiss, on file).

The defendant *Williams* defaulted and his default was duly entered (Tr. 17); the case was tried to a jury against the plaintiff in error *Richards* and the following *verdict* was rendered:

“We, the jury duly impaneled and sworn to hear, try and determine the issues in the above-entitled action, do find in favor of the plaintiff and against the defendants, Edwin Richards and Edward Williams, *copartners* as Richards & Williams, and the defendant Edwin Richards, and do find that there is now due and owing and unpaid from said defendants to plaintiff the sum of \$3,500 *principal* due on the note sued on in the above-entitled action; together with *no interest* thereon, together with an attorney’s fee for plaintiff’s attorneys in the sum of \$750. Dated, March 26, 1914” (Tr. 18).

Section 325, Alaska Civil Code, provides:

“A limited partnership may consist of two or more persons who are known and called general partners, and are *jointly and severally liable* as general partners now are by law
* * * .”

Judgment (Tr. 17-19) was thereupon entered as follows:

“1. That the plaintiff have and recover from Edwin Richards and Edward Williams, *copartners* as Richards & Williams, and from the defendant Edwin Richards as an individual, the sum of \$3,500 together with an attorney’s fee the sum of \$750.

“2. That plaintiff have and recover from the defendant Edward *Williams*, as an individual, the sum of \$3,500 together with interest thereon from February 24, 1911, to date, at the rate of

12% per annum, amounting to \$1,312.50, and an attorney's fee in the sum of \$750.

"3. That the plaintiff have and recover from the defendants, Edward Williams *and* Edwin Richards, *copartners* as Richards & Williams, and Edwin Richards and Edward Williams, as individuals, the costs of this suit to be taxed by the clerk" (Tr. 19).

The Court will notice that *interest* was *not* allowed by the verdict (Tr. 18) against *Richards*, and the *judgment* against *Richards* does *not* therefore include any *interest*, while *Williams* defaulted and the judgment against *Williams* *does* include interest (Tr. 19).

Verdict was rendered and filed March 26, 1914 (Tr. 14-16); *new trial* denied April 18, 1914 (Tr. 16) and the *judgment* was dated, signed, served, service admitted, and filed April 20, 1914 (Tr. 20).

The judgment is a *joint* judgment against Edwin *Richards*, this plaintiff in error, *and* Edward Williams *copartners* as Richards & Williams *and* Edwin Richards as an individual, for \$3,500 and the attorney's fee of \$750; and is a *joint* judgment against Edwin Richards *and* Edward Williams, *copartners* as Richards & Williams, and Edwin Richards and Edward Williams as individuals *for costs*; and against Edward Williams as an individual for \$3,500, and *interest* thereon from February 24, 1911, of \$1,312.50 and an attorney's fee of \$750 (Tr. p. 19). Under Section 325, Civil Code of Alaska, *supra*, each partner is jointly *and severally* (but *not separately*) liable.

That part of the judgment against Edwin Richards, *as an individual*, does not constitute a separate judgment, but is simply a declaration by the Court *in* the judgment of the legal liability of Richards *as a copartner*; that is, he is, as is each partner, individually liable (jointly with his partner and severally) to creditors of the partnership for the *whole* partnership indebtedness, and has his recourse by contribution from his copartner for all liability satisfied by him in excess of the liability of the partners as between themselves; the whole partnership property *and* the individual partners are in law liable for the *whole* partnership indebtedness, while only the individual interest of each partner *in* the partnership, over and above his liability for debts of the partnership and to his copartner in contribution, is liable for the *personal* debts of the partner; therefore that part of the judgment in this case, which is asserted by plaintiff in error to be a *separate* judgment against him as an individual, amounts to either a declaration by the Court *in* the judgment of Richards' liability for the *whole* principal sum of \$3,500 and \$750 attorney's fee and costs, and therefore is not improper as part of the judgment and does not change the *joint* character of the judgment, or, it is surplusage and its reversal would not benefit as its presence cannot and does not injure plaintiff in error.

1. The writ of error was by plaintiff in error alone applied for;

2. The record does not show that it was applied for in open Court, but does show it was not, that it was by *petition* in writing served only on defendant in error, and the order allowing the writ expressly states that it was filed "this day" (April 21, 1914, Tr. 290) with assignment of errors;

3. Citation was issued and served May 2, 1914, and cites defendant in error only; and there was no severance or notice or order therefor to permit plaintiff in error to alone sue out the writ of error.

The writ of error was *not* petitioned for or allowed *in open* Court, and there is nothing in this record (nor even in the typewritten documents filed by plaintiff in error on the argument in this Court) showing or suggesting that the plaintiff in error either petitioned for the writ or that the writ was allowed *in open* Court; but the contrary clearly appears from the record, thus: admission of *service* of the "*petition*" for writ of error is admitted by opposing counsel (Tr. 289); the "*order* allowing writ of error" is *dated* April 21, 1914 (Tr. 290), and expressly recites: "The answering defendant Edwin Richards, plaintiff in error, having *this day filed his petition* for writ of error * * * together with an assignment of errors" (Tr. 289).

The writ of error was itself *issued* May 2, 1914, and contains upon its face: "The foregoing writ is hereby allowed. F. E. Fuller, Judge" (Tr. 293), and was served the same day; the *citation* was issued and served the same day, and cites *only* the defendant in error here (Tr. 294-295).

This judgment being *at law*, could be reviewed by writ of error only and *not* by appeal, *citation* was necessary, and notice of a writ of error even if given in open Court is not equivalent of citation and the citation issued names and cites only the defendant in error (Tr. 294).

If this writ of error (not an appeal taken) was applied for and allowed in *open* Court, the plaintiff in error could easily have obtained and filed here the *certificate* of the clerk of that Court showing that fact, as it does *not* appear in the record; and even then a citation is necessary on writ of error and was issued and is in the record, and the citation cites only the defendant in error (Tr. 294).

In *U. S. v. Phillips*, 121 U. S. 254; 30 L. Ed. 914, the Supreme Court by Chief Justice Waite, said:

“Notice of a writ of error, given in open Court at the same term the judgment is rendered, is not the equivalent of the citation required by Section 999, Revised Statutes. In this respect writs of error *differ* from appeals taken in open Court. The writ of error is dismissed.”

Rule 63, of the District Court of the Territory of Alaska, expressly provides:

“Rule 63. One Appellant from Joint Decree. —In cases where there are two or more parties bound by a joint decree, whether they be complainants or defendants, and an appeal or writ of error is sought, *all* the complainants or all the defendants, as the case may be, *must join* in taking the appeal unless a severance has been allowed. If one or more of the parties bound

by a joint decree desire to take an appeal or writ of error for the protection of his interests, and the others bound with him will not unite in such appeal or writ of error, then a petition setting forth the facts may be filed in this Court, notice of the hearing thereof given to the parties refusing to appeal, and if upon the hearing it appears that the named parties refuse to unite in an appeal or writ of error, an order may be made granting the right of appeal or writ of error to the petitioner and barring the other parties from such rights, such order being for the benefit of the adversary party and to protect him from more than one appeal or writ of error from the same decree" (*Motion* papers on file—Certified copy of Rule is thereto attached).

The clerk of that Court also certifies no severance was ever requested nor any notice thereof given.

The liability of partners is *joint*, in the absence of statute.

30 Cyc., pp. 520, 533, 534.

Section 325, Civil Code of Alaska, makes partners *jointly and severally* liable, as it expressly declares "general partners now are by law".

In *Copeland v. Waldron*, 133 Fed. 217, this Court, *Hawley*, District Judge, rendering the opinion, *Gilbert* and *Ross*, Circuit Judges, concurring, has so clearly and fully covered the several phases of this motion to dismiss the writ of error, that we quote the entire decision:

"The motions herein made will be considered together. Appellants admit that the decree appealed from is joint, and that a joint decree

should be appealed from by all, or severance made; that the fact that Pirie did not appear in the lower court furnishes no excuse for appellants leaving him out on the appeal; and that this court had the power to dismiss the appeal for want of his presence. But appellants claim that the contention of appellee that this court has no power to bring the omitted party in is not correct.

"We are of opinion that the facts of this case bring it within the rule announced by the Supreme Court in *Estis v. Trabue*, 128 U. S. 225, 229; 9 Sup. Ct. 58; 32 L. Ed. 437. After holding that a writ of error, in which the plaintiff and defendants were designated merely by the name of a firm containing the expression '& Co.,' was not sufficient to give the court jurisdiction, but, inasmuch as the record disclosed the names of the persons composing the firm, allowed the writ to be amended, under section 1005 of the Revised Statutes (U. S. Comp. St. 1901, p. 714), the court said:

" 'But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against the claimants, and C. F. Robinson and John W. Dillard, their sureties in their "forthcoming bond," jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties or as containing a judgment against the sureties, payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. * * * It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ, or else there

must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered * * * Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. * * * It will then, of its own motion, dismiss the case, without awaiting the action of a party.'

"This case is directly in point. It is, however, argued that since the rendition of the decision the Supreme Court has changed its ruling, and accepted the views contended for by appellants; and our attention has been called to *Inland & Seaboard Coasting Co. v. Tolson*, 136 U. S. 572; 10 Sup. Ct. 1063; 34 L. Ed. 539, which it is claimed is 'strikingly illustrative' of their contention. The facts in that case were dissimilar from the case at bar. There Tolson recovered damages in the Supreme Court of the District of Columbia. The *Inland & Seaboard Coasting Company* was the sole defendant therein, and gave an undertaking with four sureties, and took an appeal to the general term, where the court, in accordance with its rule in such cases, when it affirmed the judgment of the special term, also entered judgment against the sureties in the undertaking. The writ of error, having been sued out without mentioning the sureties, was dismissed. In moving to rescind the judgment of dismissal, the plaintiff in error argued that the judgments of the general term 'were in fact and in law two judgments. and that the sureties were not parties to the tort suit'. The court contented itself by a simple order granting the motion to rescind the dismissal, and allowed the writ of error to be amended so as to include the sureties. We are not prepared to say that in making this order there was necessarily any departure from the rule announced in *Estis v.*

Trabue, and it is fair to presume that none was intended. Within five months after the decision in the Tolson case the Supreme Court decided *Mason v. United States*, 136 U. S. 581; 10 Sup. Ct. 1062; 34 L. Ed. 345, where a postmaster and his sureties were sued jointly for a breach of the bond, and he and a part of the sureties appeared and defended, the suit was abated as to one of the sureties, the others made default, and judgment of default was entered against them. The sureties who had appeared and defended the suit sued out a writ of error. A motion was made to amend the writ by adding the omitted parties, and the motion was denied.

"*Walton v. Marietta Chair Co.*, 157 U. S. 342, 346; 15 Sup. Ct. 626; 39 L. Ed. 725, furnishes an illustration of the character of cases where amendments to the writ of error should be allowed under the provisions of section 1005 of the Revised Statutes. They are cases where 'the statement of the title of the action or parties thereto in the writ is defective', or where the defect, whatever it be, 'can be remedied by reference to the accompanying record'. This is also made clear by reference to the language of the statute. This is not a case where the appeal is merely defective in form.

"The truth is that the rule must be determined by the particular facts in each case as they arise. In the present case the record does not, as mentioned in the statement of facts, disclose that James Pirie, who was one of the three parties against whom the suit was brought to recover damages for breach of a joint contract, and against whom judgment was rendered, was in any manner joined in the appeal, or that he was ever notified to join, or severed for failure or refusal to join. These things must appear to give this court jurisdiction of the appeal. As was said by the court in *Inglehart v. Stans-*

bury, 151 U. S. 68, 72; 14 Sup. Ct. 237; 38 L. Ed. 76:

“ ‘This could only be shown by a summons and severance, or by some equivalent proceeding, such as a request to the other defendants, and their refusal to join in the appeal, or at least a notice to them to appear, and their failure to do so; and this must be evidence upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter.’ ”

“The motion to dismiss is granted, and the motion to amend denied.”

In *Continental & C. T. & S. Bank v. Corey Bros. Const. Co.*, 205 Fed. 282, a decree was made awarding first liens, etc. to complainant by the District Court and two only of several defendants appealed. This Court, before *Gilbert, Ross and Hunt*, Circuit Judges, said:

“Sale of the property of the Irrigation Company was ordered, unless payment was made by it or by any of the other defendants. Equity of redemption of the defendants was to be forever barred, and terms of sale were prescribed in detail, the purchaser to hold the property free from all liens of all the parties to suit.

“From this decree, rendered December 27, 1912, the Continental & Commercial Trust & Savings Bank and Frank H. Jones, trustees, appealed. Appeal was allowed March 26, 1913. It does not appear that any of the other parties defendant against whom the decree is rendered join in the appeal, or that they or any of them were notified to appear, and that they or any of them had failed to appear, or, if appearing,

had refused to join in the appeal. Such a situation compels us to order a dismissal of the appeal.

“The Supreme Court, in *Masterson v. Hern-
don*, 77 U. S. (10 Wall.) 416, 19 L. Ed. 953, held
that it was established that, where the decree is
joint, all the parties against whom it is rendered
must join the appeal, or it will be dismissed.
The court said:

“ ‘We think there should be a written notice
and due service, or the record should show his
appearance and refusal, and that the court on
that ground granted an appeal to the party
who prayed for it, as to his own interest. Such
a proceeding would remove the objections made
to permitting one to appeal without joining
the other; that is, it would enable the court
below to execute its decree, so far as it could
be executed, on the party who refused to join,
and it would estop that party from bringing
another appeal for the same matter. The
latter point is one to which this court has al-
ways attached much importance, and it has
strictly adhered to the rule under which this
case must be dismissed, and also to the general
proposition that no decree can be appealed from
which is not final, in the sense of disposing of
the whole matter in controversy, so far as it
has been possible to adhere to it without hazard-
ing the substantial rights of parties interested.’
Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct.
39, 36 L. Ed. 933; *Sipperley v. Smith*, 155 U. S.
86, 15 Sup. Ct. 15, 39 L. Ed. 79; *Loveless v.
Ransom*, 107 Fed. 626, 46 C. C. A. 515; *Provi-
dent Life & Trust Co. v. Camden et al.*, 177
Fed. 854, 101 C. C. A. 68; *Ibbs v. Archer*, 185
Fed. 37, 107 C. C. A. 141; *Grand Island & W.
C. R. Co. et al. v. Sweeney*, 103 Fed. 342, 43
C. C. A. 255.

“Holding, therefore, that we are without
jurisdiction, the appeal will be dismissed.”

De Los Angeles v. Maytin, 216 U. S. 598, 601; 54 L. Ed. 632, 634. The Supreme Court, citing Hardee v. Wilson, 146 U. S. 179; 36 L. Ed. 933, said:

“The defendant, Mrs. Beatrice de Los Angeles, appealed, but, as the other defendants did not join in the appeal, and there was no summons and severance, the appeal must be dismissed.”

Hardee v. Wilson, 146 U. S. 179; 36 L. Ed. 933. The Court said:

“In the case of Masterson v. Herndon, 77 U. S. 416; 19 L. Ed. 953, it was held that, ‘It is the established doctrine of this Court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error’.”

Citing: Downing v. McCartney, 131 U. S. XCVIII, Appendix; 19 L. Ed. 757. The Court said:

“In the case of Downing v. McCartney, where the decree below was joint against three complainants, and one only appealed, and there was nothing in the record showing that the other complainants had notice of this appeal, or that they refused to join in it, the appeal was therefore dismissed.”

Citing Mason v. U. S., 136 U. S. 541; 34 L. Ed. 541. The Court said this

“was a case where a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and part of the sureties appeared and defended. The suit was abated as to two of the sureties who had died, and the *other* sureties *made default and judgment by default* was entered against them. On the trial a verdict was rendered for the plain-

tiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties *who appeared* sued out a writ of error to this judgment, *without joining* the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as complainants in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed. In *Feibelman v. Packard*, 108 U. S. 14; 27 L. Ed. 634, a writ of error was sued out *by one* of two or more joint defendants, without a summons and severance or equivalent proceeding, and was therefore dismissed”.

Port v. Schloss Bros. & Co., 149 Fed. 731, was decided by the Circuit Court of Appeals for the Third Circuit, and was against *partners*; one appearing and defending, the other defaulting but appearing as a witness; the defending partner alone, without any severance or notice suing out a writ of error, which the Court dismissed; and the case being so similar to the one now before the Court and the opinion short, we quote it as follows:

“This is a writ of error to the Circuit Court of the United States for the Western District of Pennsylvania. In that court Schloss and others, citizens of Maryland, brought an action of assumpsit against Clarence A. Port and W. J. Snyder, citizens of Pennsylvania, partners, trading as Port & Snyder, for a merchandise account in excess of \$2000. Both defendants were served. Port appeared and defended the suit. Snyder entered no appearance, but was called as a witness. The jury was sworn against both defendants without objection by Port, and after a trial on the merits a verdict

was rendered in favor of the plaintiffs for the full amount of their claim. After entry of judgment against both defendants Port alone sued out this writ of error, then for the first time raising the question that a judgment for default should have been entered against Snyder; that the jury was improperly sworn against both defendants; that the judgment against Snyder was invalid, and therefore there was error in entering judgment against him, Port.

“Before passing on these questions, we are met by a motion of the defendants in error to dismiss this writ. In support thereof it is contended that, there being a joint judgment against both Port and Snyder, a writ of error will not lie unless both join in it. There has been no summons, severance, or sufficient ground for nonjoinder shown. The motion to dismiss is supported by authority. In *Feibelman v. Packard*, 108 U. S. 14; 1 Sup. Ct. 138; 27 L. Ed. 634, it was said:

“ ‘Moses Feibelman and George Woelker, as partner, sued the defendants in error to recover damages for the seizure of their partnership goods by Packard, marshal of the United States for the district of Louisiana. A judgment was rendered against them. Their interests in the suit was joint, and the judgment affects them jointly and not separately. Feibelman alone has brought this writ of error, and there has been no summons and severance or other equivalent proceeding. It follows that the writ must be dismissed on the authority of *Williams v. Bank of the United States*, 11 Wheat. 414, 6 L. Ed. 508; *Masterson v. Hurdon*, 10 Wall. 416, 19 L. Ed. 953; *Simpson v. Greeley*, 20 Wall. 152, 22 L. Ed. 338.’

“To the same effect, in addition to the case cited are *Estis v. Trabue*, 128 U. S. 228, 9 Sup. Ct. 58, 32 L. Ed. 437, and *Mason v. United*

States, 136 U. S. 582, 10 Sup. Ct. 1062, 34 L. Ed. 345.

“In view of these decisions, the motion to dismiss must prevail.”

Hughes, Federal Procedure, 2d Ed., p. 555, says:

“The reason why, *all* the parties must join where the judgment is *joint* is that otherwise the Court could not execute its decree on the parties who refused to join, and such parties might in their turn attempt to review the case also.”

The plaintiff in error at the hearing in this Court filed several documents, which he then frankly stated he did not think affected the question or the decision of the motion to dismiss; but, as they were filed, it is proper that we should point out their peculiar features:

1. There is a *certificate* by the clerk of the Alaska District Court purporting to *add* some things to the record, and contradict the record and his own certificate as to others; for instance, to add that the third and last trial of this case took place in March, 1914, that defendant Williams made default, and to *contradict* his own present record, stating “that in said records and files there is *no reference* to such default other than the one contained in the final judgment of April 20, 1914”, while the record here under the same clerk’s certificate (Tr. 296) shows that the default *is* referred to, counsel asked that the default of Williams be entered *during the trial* (Tr. 244).

2. There is next an execution and its return partially satisfied, but unintelligible beyond these facts: there is absolutely nothing to show any levy or how the marshal came to sell what he did.

3. Next is a "statement and declaration by defendant, Edward Williams". This document purports to be *acknowledged* by Williams before a notary public, but *not sworn* to by Williams; it is unintelligible and contradicts the record now before the Court in nearly everything, in everything that it does state; for instance it refers to a separate judgment against him, Williams (not Richards) for \$250, and another for \$5562.50, which certainly can have no significance here. The judgment against *Williams* is for \$3,500. *Principal* of note, and *interest* from February 24, 1911, and \$750 attorney's fees (Tr. 19); while the judgment against *Richards* is only for \$3,500 *principal*, and \$750 attorney's fees (Tr. 19), as the *verdict* against *Richards* was *without interest* (Tr. 18) with *no interest* thereon. This record shows a judgment against him and plaintiff in error for \$3,500, principal of note and \$750 counsel fees (Tr. 19). He makes a number of statements that affect no question here, and winds up by asking this Court "to pass upon the merits of the writ of error without any reference to any supposed rights he may have," but he never suggests anywhere, nor does the record, that he was ever notified by Richard's application for the writ of error, or was asked or refused to join in the writ of error with Richards.

We respectfully submit that the writ of error should be dismissed.

II.

THE CASE ON THE MERITS.

The "*statement of the case*" made by the plaintiff in error in the "brief on behalf of plaintiff in error", is not entirely fair, is partial and inaccurate in many respects, and is not satisfactory to the defendant in error; therefore, requesting the indulgence of the Court, we will proceed to state the case as developed at the trial and by the evidence:

STATEMENT OF THE FACTS.

The complaint alleges the American Bank of Alaska (hereinafter styled the Bank) was a corporation; that Edward Williams and Edwin Richards were a mining copartnership, engaged in business in the Iditarod district of the Territory of Alaska, under the firm name and style of Richards & Williams (Tr. 3, 4); that in September, 1910, the Bank at the special instance and request of the defendants loaned defendants \$3500, which they promised and agreed to repay, and on February 24, 1911, defendants in consideration thereof made, executed and delivered to the Bank their promissory note wherein they agreed on or before July 1, 1911, to pay the Bank \$3500 with interest at 12 per cent per annum, and in case of suit to collect the same to pay such additional sum as the Court

may adjudge reasonable as attorney's fees in such suit; that no part of the principal or interest had been paid; that the Bank was compelled to employ attorneys to sue and recover on said promissory note, and has become liable for a reasonable attorney's fee, and that \$750 would be a reasonable sum to be allowed the attorneys for their services in this action (Tr. 4-5); a second count for money overdrawn was subsequently dismissed (Tr. 12).

Williams was served and defaulted and his default was entered (Tr. 244) *before* the end of the trial (and *not* "was never entered until the close of the trial," as the brief, p. 2, states). Richards, the plaintiff in error answered, admitting certain facts as alleged in paragraph 1, on page 1 of the complaint, but denied (by reference to paragraphs and pages) each and every allegation, statement, matter and thing contained in paragraphs 2, 3 and 4, on pages 1 and 2 of the complaint, and as to paragraph 5, page 2, denies he has knowledge or information concerning same sufficient to form a belief (Tr. 8 and 9).

The evidence on the trial was as follows: And we state *first* the evidence of Williams and *second* the evidence of *Richards*, the other evidence following thus:

Williams and Richards had been *intimately* acquainted for 10 or 12 years,—and Williams had worked a good deal for Richards. Early in September, 1910, Williams was on Cache Creek, in the Hot Springs District. He had been working for

Richards that summer. Earlier in that year he had received a letter from John Boulton in Iditarod. Richards and Williams discussed the letter, but Williams did not remember whether he showed him the letter to read (Tr. 22). About the middle of September, 1910, Richards received a telegram from Boulton, dated Kaltog, Alaska, September 12, 1910, reading: "Dick Richards, Hot Springs, Alaska. Send two thousand at once through N. C. Fifty thousand at stake twelve dollars foot. Freeze out game don't fail see letter. Answer John Boulton." Richards got that telegram on Cache Creek. Williams was staying in Richards' cabin at the time. Richards and he had a conversation with reference to the telegram, but the character of the conversation he couldn't just state. They talked the matter over and he thinks Richards knew something about the matter—the contents of the letter Williams had received earlier in the season, and at that time a friend of his was going to the Iditarod and Richards phoned him to look the proposition up, and that night he and Richards discussed it, but he isn't sure. We passed our remarks about him, what kind of a boy he was. Williams always thought him all right and spoke pretty favorably about him. Williams had no money and Richards knew that; he had been working Richards' ground there that summer, and was in debt to Richards at that time. They discussed about Williams going to Iditarod. Nothing definite was agreed upon. The following morning Richards gave Williams a check

for \$2,300 and \$200 in currency (Tr. 23-25). The conversation and what was agreed upon was that Williams was to go down there and use his own judgment and make a purchase, and to use his own judgment with reference to any transaction, and was supposed to work whatever was purchased. Nothing was said what would be done with the profits from anything purchased (Tr. 25). Between the time that telegram came and the time Williams left Hot Springs with Richards, and after Richards had given him the \$2,500 Richards said to Williams: "If there is no confliction with that ground, *we will go stronger than that*" (Tr. 26). This was late in the evening that Richards said this, and I pulled out at 4 o'clock in the morning. Richards hired and paid a man to row Williams to Gibbon, and engaged the boat. I heard something from a fellow named Merrifield who had been there, and Richards told me to go down town to Tofty and see him to find out something about the ground; I saw him and came home and talked the matter over with Richards, that Merrifield told me it looked very favorable, that he had a good thing down there. He had been on the creek. Richards telephoned Williams to Tofty, telling him that if he could get to Gibbon on a small boat he could catch the "Susie" (Tr. 26-29). The money Richards gave Williams, the \$2,500, was not borrowed by Williams from Richards. Richards said he was too busy to go himself. Williams caught one of the packets at Gibbon and reached the Iditarod the very latter part of Septem-

ber, 1910; he had exchanged the money for a letter of credit to the N. C., got the money and took it to the Miners & Merchants Bank, where he deposited it in his own name (Tr. 29). Williams then went to the Boulton lay there, went out on the creeks and looked the matter over; he was introduced by Mr. Morgan to Mr. Hurley (president of the American Bank of Alaska (Tr. 158), and told him he wanted to buy a half interest in the Boulton lay or three-fourths of it—in fact, he bought the half first and then the three-fourths for \$4,500. Williams had the bill of sale in the *name of Richards & Williams* (Tr. 30-31). After he had seen Hurley he drew out his money and took it down to Hurley; told him he had no power of attorney from Richards and any agreement between Richards and him was verbal, that *Richards was Williams' partner* (Tr. 31). He told Hurley what he figured doing with the money. Boulton had a mortgage for \$1,500 on the ground and he had done business with Hurley, and Williams was to assume the mortgage; I asked to borrow \$3,500. Williams told Hurley it was Richards' money, and he suggested that he deposit it in the name of Richards & Williams, because if anything happened to him no one could get the money without a good deal of trouble (Tr. 31-33). He opened the account "Richards & Williams" and deposited \$2,000 or \$2,100 with Hurley's bank at that time. He made the loan and signed a note at that time. This is the note:

“Fairbanks, Alaska, Oct. 6, 1910.

\$3,500.

On or before ninety (90) days after date I promise to pay to the order of American Bank of Alaska, at its office in Fairbanks, Alaska, thirty-five hundred no/100 dollars for value received with interest after date at the rate of twelve per cent per annum until paid. Principal and interest payable only in U. S. gold coin, of the present standard of weight and fineness. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety, and promises in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the court may adjudge reasonable as attorney's fees in such suit. (Signed) Richards & Williams, per Ed. Williams.”

Note stamped on face in blue ink as follows: Paid Feb. 25, 1911, American Bank of Alaska, Iditarod Branch (Tr. 33-34).

There were considerable debts in connection with the ground. Checks were drawn against the account, signed: “Richards & Williams, per Ed. Williams” (Tr. 36). A bundle of checks similarly signed and drawn was offered in evidence but, on the statement and stipulation of counsel for the plaintiff in error: “When *they* bought the lay from Boulton and the interest from the other two men, Kennedy and Shively, *they* had a lot of debts then, and, instead of paying the money directly to them, he paid their creditors, and these are the checks, and that was the testimony before; but it don't signify anything” (Tr. 37), they were not filed.

October 24, 1910, *Williams* wrote *Richards* the following letter (Tr. 38-42):

“Flat Creek, Oct. 24th, 1910.

Friend Dick:

You will no doubt think you are never going to hear from me, but conditions with regards to the mail service are rotten, and to try and get a wire to you was out of the question, so I decided to use my own judgment and do the best I possible good and I hope when you have read this letter that its contents will cause you no worry.

I arrived at Twilight City Sept. 27th, and found Jack waiting for me. We left the next day for the Creek to look over the situation. In the first place I got acquainted with two of the owners at Dikeman on their way outside, and I got busy asking questions about the lay. They spoke very favorable of the proposition, telling me to look over the proposition and satisfy myself. They also said they would like to see Jack make money as he was the first one to locate the pay. I made it a point to see all the owners before to find out if they would consent to the transfer of the lease before I commenced talking business to Jack and his partners. As they did not agree to the transfer of Dave Johnson lay to Doc Madden without a consideration of \$6,000, which he paid, making a total of \$46,000 which he paid for the thousand feet.

I had no difficulty in getting the consent of all the owners. I then commenced looking into Jack's condition of affairs. I discovered nothing of a complicated nature. In fact, Jack had the whole thing in his name. He had mortgaged his half to make a payment which his partners could not meet for \$1,500. There was also a great many small debts amounting to about \$2,000.

Now, Dick about the ground. It is undoubtedly good ground, yet I think Jack exag-

gerated when he stated \$12 to the foot, but the \$50,000 stake. I don't think he did, for I honestly believe the ground will yield \$150,000. I may be wrong and to make a long story short I purchased ($\frac{3}{4}$) three-quarter interest in it for \$6,500. It is a 75 per cent lay 520 feet up and down stream and 1320 feet across.

I must now enlighten you in regards to the way I made the deal. In the first place, the money I had was hardly a starter. Jack had half interest, his two partners the other half. I paid \$4,500 for there half, and Jack \$2,000 for a quarter. I assumed all the debts of the half and paid them \$1,775.75, \$887.75 cash and the balance in four months time. Also there share of the debts which amounted to \$1225.00, the most of which I have paid. Also the mortgage of \$1500 making a total of \$4500. I have only paid \$500 on the mortgage at the time writing.

I have also paid Jack share of the debts \$778. Also \$350 in Cash and the balance \$872 when we can. Now Dick how I got the money is the hardest part for me to tell. You may be angry, but I did not do it with any selfish motive or trying to take advantage of the kindness you did for me; yet if I had have received you letter, which I got 4 days ago, I don't think I would have bought it, but it was too late.

I deposited the money in the American Bank of Alaska. Mr. Hurley is the manager. I told him the money was yours. He told me in case anything should happen me unless I deposited in yours and my name, you would have some trouble getting it, so I did as he advised, and signed the cheques, Richards & Williams. Now, Dick, I had to have more money. I first goes to the Merchant and Miners Bank and tried to do business with them. He offered to place to my credit dollar for dollar to the amount of \$10,000. That is I would deposit \$5,000, he

would give me credit for \$10,000. I couldn't see my way clear to make that transaction, as he wanted a mortgage on the loan and the owners did not care at that time to agree to mortgaging the lease.

So I goes to the American Bank of Alaska and borrows (\$3,500) for 3 months at one percent, with the understanding that it is to be renewed if it is not convenient to pay when due (90) days.

Now, Dick, I had to sign the note Richards & Williams, and I sincerely hope you wont be offended, and I give it to you my word, also Jack's that every dollar we put into the ground purchasing price included, come out of the ground before he get one dollar. It is a proposition you can't loose on. If you don't make \$20,000 out of it I will miss my guess.

You say you want to be on the ground yourself and I assure you I want you to come down; in fact, you have got to come as it requires money to do business in this camp. It requires heavy machinery as the top has got to be scraped off 6 or 7 ft. of it. It is from 16 ft. to 18 ft. to bedrock. It is hard ground to sluice. They dump it on to almost a flat apron and use a nozel on it from a two or three inch pump which they keep in the cut sufficient to keep out the water. The ground is all thawed. You will after pump there is lots of water but can't get up high enough to get good tailing room. Wood is very high, it will cost from 12 to 15 a cord on the claim. So you can see why you should here.

I bought a 40 H P boiler from T. Aitken, \$2200, \$700 down and gave my note for the balance. I did not use your name on the note. It is due the 1st of June. Now, Dick, my money is getting pretty low, that is, I have no money to do business with, such as machinery and wood. That is the reason I want you to come down. I know Dick this proposition places you

in rather an awkward position and I sometimes wish I had never gone into it when I think of the position it places you in. It will mean at least 2 years work on this ground alone, but what of it, Dick, when it is a sure thing?

I have lots of grub for the winter and a nice cabin on the ground and the lumber and boxes on the lay cost about \$250. Jack is leaving tomorrow for the upper Iditarod with a prospecting outfit, intending to stay for the winter. He don't want anything to say about the working of the layout. He wants you to take it and do what you like. I will be all alone. Will find a little work to do cutting brush out on the claim and may pick up 30 or 40 cords of wood.

Tom Burns as the lay below—he 1000 ft. 70 per cent Strandberg Brothers $\frac{2}{3}$ lay of Ester next, Henderson who used to haul wood on Dome next, G. Friend 60 percent next, Ronan and Monckmon (60 percent) next. Above me is a 500 ft. lay which could be bought. They are asking \$15,000 for it. They have been offered \$11,000 for it. Then the Gugg, Dave Johnson, D. Madden, T. Aitkens. It is reported Aitkens took out \$200,000. Dr. Madden \$170,000, the Guggs were hoisting 1000 a day or better so the owners to the ground told me with a small crew. This so you can judge for yourself how this proposition looks to me.

Now, Dick, whatever I have done I hope will meet with your approval, as I want to do what is right by you.

I am in town—have been in for a day or two getting an outfit for Jack and getting the Bill of sale for the $\frac{3}{4}$, have it made out to you and me, which I hope will be satisfactory.

Mr. Aitken will call on you and explain the conditions in this camp and will enlighten you a good deal.

Tom Williams is over on the Kuskerwin prospecting. Shorty Greggan also. I saw him a

few days ago. He has nothing fat. John Johansa Earn are both hear, not doing any think.

I must now close hoping to hear from you or else see you in the near future.

Sincerely yours,

(ED. J. WILLIAMS),
Flat Creek, Iditarod, Alaska."

Richards wrote Williams on December 8, 1910, in reply to that letter, as follows (Tr. 44-47):

"Tofty, Alaska, Dec. 8th, 1910.

Friend Ed:

Received your registered letter last night, 7th, and other two letters Monday night 5th. I would have answered them on the return mail, only when you address to Hot Springs, the letters to there first. They should be addressed to Tafty from that direction. I was rather surprised on reading your letter. You are going some, I did not see T. Aiken. I heard he went past here 2 weeks ago, so I called him on the phone at Hot Springs. He told me you purchased $\frac{1}{2}$ interest in the lay, and he thought it was good ground, asked me if it would be all right about some money due first of June, so I told him I didn't know a thing about anything, as I had no word whatever. He thought I would have been informed about it and that was all. As I said I was surprised as its been so long since you left I would have knowed something before. First of all, I want to ask you, as you say nothing about it, is that 5.00 or 8.00 ground located on that lay. I never heard it was a yet, neither on that lay above. They surely would buy that as well as Dave Johnson's lay if they could show the goods. I hope you have it there. Regarding coming down there, you know Ed that I paid cash for ground here before you left, and it would be almost impossible for me to leave this place,

unless I was rid of everything I have here, and if I came down there to work ground, I would certainly bring my machinery down. I couldn't go to work and buy machinery there while I have this on hand, and besides I have contracted 300 cords of wood and over, and partly paid for, which means over \$2,000. You, Dan and Jack should certainly be able to work that ground. I realize you have put yourself under considerable obligations. What on earth did you make all them due in three and four months, come due in the heart of winter, when there is no possibility to raise a dollar. Regarding that account at the Bank in both our names, that is certainly a mistake. When I gave you a check for the money and you gets a letter of credit on it, my name should not be used at the Bank. I never had the least idea you should assume any obligations beyond what would relieve the situation and what Jack called for at the time, and now when I see Jack gets some of the money himself and takes to the woods. And whatever became of that letter he was sending, never showed up here as yet. Well, now Ed to make this shor, I believe the best way out of this, you should try to get some of them moneyed fellows down there to go in with you. Consider me out of it altogether. Doubtless you should have no trouble in doing business with that kind of ground, and with people there that knows it. I figure I have as much at stake here, although I may have nothing, but it's certainly easier for many of them to leave Hot Springs than me, and also I am having a little anxiety regarding my head. I don't know but there's a head datch or something remaining and am liable to be required to seek medical aid any time, so it wouldn't do for me to be there. There is a mail leaving in the morning and I must take this to Kelly tonight, so I am sending at the earliest possible. I don't know

how long it will be getting there. I realize Ed that you mean all right, and I sincerely hope you will make out all right. When I said I would like to be on the ground myself, I meant it, in so far when it requires so much expense to start, as it seems to there. At the same time. I had no thought of coming down there at the time, as I though you and Jack capable of working any ground if you try, but after I talked with several from there after you left, I did not think you would go into it, as I haven't seen anyone knew that Jack had pay outside of Dolar and half to foot ground and that wouldn't be worth working in that country. So I went ahead contracting obligations here, and must stay with it. If you manipulate another deal, it would be better for you to have the Bill of Sale made over from the old laymen. I sincerely hope you'll make out all right. You are perfect welcome to use that money until you can make it. There is nothing new here. There was a small find made out on a creek near Fish Lake by Tom Lockhead. Gus is down prospecting with Patten. They are getting some prospects. I have my fifth hole near down at mouth of Dalton, but haven't anything as yet. Dick Morris and partners sold out to Howell. Dutch is taking out a dump on the Eureka. Will enclose. Kindly let me know if you make out all right. It seems to me you could easily make some transaction to advantage on that kind of ground. I don't care to go any more. In fact I can't at present and the only way I would do any more would be bringing my plant down. I wouldn't think of buying machinery. With sincerest wishes for success.

Yours, DICK."

Richards had written *Williams* on September 21, 1910, which *Williams* received *after* he had made

the loan of \$3,500 from the Bank (Tr. 50); and Williams in his letter of October 24, 1910 to Richards, refers to the letter Richards wrote him on September 21, 1910, stating that if Williams had received Richards' first letter only "4 days ago" (Tr. 40), and says: "If I had received your letter, which I got 4 days ago, I don't think I would have bought it, but it was too late" (Tr. 40). It takes the mail *thirty days* to go from Fairbanks, where the letter of Richards was written (Tr. 48) to Iditarod where Williams received it; the mail service was a monthly one (Tr. 50). The following is that letter (Tr. 48-49):

"Fairbanks, Alaska, Sept. 21st, 1910.

Dear Ed:

Have met people on the Str. coming to Fairbanks, and others after arriving here, and from what I learn, Jack has a promising lay on the Wildecat, but from what they all say, its in a complicated condition. He has partners, several complicated transactions has occurred, and I don't believe its advisable for us to go into it. We couldn't get no interest of any value, and its going to take a good deal more money to handle it than what you have, possibly not now, but in the future he will have to get big machinery to work it, and I don't care to go into it that steep, unless I could be on the ground to attend operations myself, so if you have not interested yourself in it by the time you get these lines, I would advise you to call it off as far as I am concerned. Keep enough money to secure yourself, and return balance to my credit at N. C. Hot Springs, through a draft like you had. I will let you know how things is looking on the lay, if I can get word off on some

Str. after I get back to the Springs.

Johnie Johanson who is bringing this letter is coming down, I believe Jack exaggerated his telegram considerable, as regard 12.00 to foot. From all these people I've seen 7.00 is about the best there is anywhere on Flat so far, and as far as his lay is concerned he has nothing located to compare with those figures. But if you have already invested anything in it, I trust you have investigated all those complicated transactions that lay has underwent. Otherwise we will be in lawsuits head over heels. Of course 7.00 ground is good enough for anybody at that, and what I learned from others is not to be depended on. You will learn the facts better right there on the ground far better than I can, so can use your own judgment accordingly. I sincerely hope that Jack has his affairs in far better shape than what I learn. He surely deserves better success after trying so hard. Convey best regards to all the boys, and will try and get a few words off after I get to Springs. Am going back to-morrow.

Wishing you good success, will remain,

Yours,

DICK.

Richards wrote *Williams* again on December 26, 1910, after he had received *Williams'* letter of October 24, 1910, as follows (Tr. 51-52):

"Tofty, Hot Springs, Alaska, Dec. 26,/10.
Friend Ed:

Rec'd your note yesterday, Xmas day. Regret to note your discern me to doubt your honesty, which I sure don't or ever meant anything to convey that impression. What bothered me was to have these fellows come after me for the money which I did not know anything about. Regarding your going down there I don't un-

derstand why you would be sorry about. Trust you had my previous letter. Its certainly I am not going to worry anything about, since you put the money into it, go to it and make something out of it. I imagine the proposition must be all right. I would be only too glad to come down there if I was footloose here, but you know my position here as well as me. I don't see how you though I could come down there. It's certainly had no intention of it last fall, or else would go down there then. As you know I looked at the thing to be of mutual advantage to both of us, but I did not calculate on putting more money than what you had; in short Jack got what he asked for in doing that and the extra money you got. I had no intention of going any further, as I took it for granted in getting that amount Jack could carry along, but that don't hurt the proposition any, if its good, its good. I can believe you as well or better than anyone else I talked with regarding it. Remember Ed in all your letters you have said nothing about the prospects in that particular piece of ground, only that you believed there was 150,000\$ in it. However its immaterial if there was a million in it, and I hope there is, I have done to much preparations here to leave being you have that much money invested already you should have no trouble in getting some one interested to carry the thing through. Go at it and make something out of it and don't worry about my part. I am sure you havent lost anything that shows around here so far, you have it all to win. Everybody around here things you have done a good thing and that you will make a stake out of it. Gus and Patten is leaving for the Hosiana, Patten having a letter from McGaff advising him to come there. Dick Morris and Co. sold their lay to Howell, \$1,000 on bedrock, and went cutting wood. Bob is going to work on Midnight-Sun—

Nothing else new of any importance. With
best wishes for success,

Yours,
Dick."

At the end of 90 days when this *note* of October 6, 1910, for \$3,500, fell due (Tr. 34), Williams saw Hurley and told him that he had received a letter from Richards and that he wouldn't do any more at present (Tr. 53). After Williams received Richard's letter of December 8, 1910 (Tr. 45), asking him to take someone else into the proposition with him, he started to look around for somebody and got McKenzie and McLellan to go in with him. Williams gave a mortgage as security for the renewal of this note; he paid the interest up to that time on the note (Tr. 53); Williams did not pay the note, but gave a new note and a mortgage (Tr. 54); the note then given is the note in this suit; no further money was received by Williams when he gave this new note (Tr. 57). The mining operations were not a success but were a failure, and Williams left there in September (Tr. 57). The new note is dated July 1, 1911 (Tr. 56). Mr. Hurley took a mortgage on the lay, and it afterwards reverted to the owners because it could not be made a success (Tr. 57). In the early part of September, 1911, before Williams left the Iditarod, Richards sent him the following communication by wireless:

"Fairbanks, Als., Sep. 12, 1911.

Edw. J. Williams, care Ind. Fone Co., Iditarod.

Buy Curran quietly eight below Dome Creek
five hundred cash money *American Bank if*

possible sell and come. Answer. Edwin Richards'' (Tr. 58-59).

Williams complied with Richards' request and made the purchase; he had Curran make out a deed and had it deposited in the Miners & Merchants Bank, and wired Richards to send the money and the deed would be withdrawn and forwarded to him; and within a week he started back to this country (Fairbanks) from the Iditarod (Tr. 59); he saw Richards the following spring, as Richards was on the way out when Williams got to Hot Springs (Tr. 60). Williams worked for Dick Richards on Dome Creek for 13 months cooking (Tr. 60); helped Richards build a cabin and worked for him for wages in Hot Springs country from March 1st to September 16, 1909. Richards did not say anything about staking me when he gave me the money (Tr. 72). *Richards told Williams* in the N. C. Company's store that *if things looked good down there that he might go stronger* than he had gone with the \$2,500 (Tr. 77). Williams was just given the money and sent down there to use his own judgment (Tr. 80). Williams told Morgan he considered Richards was his partner (Tr. 88). Williams did not have money enough to buy out Shively and Kennedy without that loan—he did not pay them all of the \$5,000, but gave checks talked about here to people they owed (Tr. 90-91). Williams told Hurley Richards was his partner, made the deposit in name of Richards & Williams and drew all checks in that name (Tr. 92). Williams

took the bill of sale in the name of Richards & Williams for the $\frac{1}{2}$ and $\frac{3}{4}$ (Tr. 94). Williams had no recollection of ever receiving a letter from Richards in the tone and with the sentence in it, "I will not be responsible for notes or whatever else you have signed my name to. Let me know as soon as possible if you have revoked the same" (Tr. 96). Williams told Hurley he would write to Richards and tell him what he had done (Tr. 98); and in his letter of October 24, 1910, he did write and tell Richards all about it (Tr. 40). Williams never told Hurley that Richards was dissatisfied and denied his right to sign Richards' name (Tr. 100). When Richards did not want to stay in the transaction, Williams told Hurley he would have to get some other partner in (Tr. 101). Williams never received a letter from Richards saying he would not be responsible for any note he signed (Tr. 115-116). The phone at Hot Springs was registered as Richards & Williams (Tr. 136); and on the index board at Hot Springs, our phone was indexed as "Richards & Williams" (Tr. 137). The bill of sale which was signed by Richards and Williams, and which Williams had had prepared and send to Richards to be signed and sent back to him, was not sent by Williams until April 4, 1911, and was not received back from Richards until after July 1st, 1911 (Tr. 137). There was never any payment of \$1,000 made by Williams on the \$3,500 note; that sum was paid on the note and mortgage for \$1,500 (Tr. 139).

Plaintiff in error *Edwin Richards*, testified:

“I am the answering defendant in this case. My name is Edwin Richards, commonly known as ‘Dick Richards’. I have lived in this part of the country since 1905. I was in Dawson before that. I have mined in the upper country and I have done mining in this neighborhood. I have mined on 2 above Dome Creek. In February, 1906, I started in over there. We were there until July, 1908, and then I went down to Hot Springs. *I knew Williams first in Dawson on Dominion Creek. He came down here before I did.* He never worked for me in Dawson; *he worked for me on Dome Creek.* I think it was from February until May of the next year, about *fifteen or sixteen months.* He was helping me in general around there when we started in. We were sinking a hole, but when we had men enough, he went to cooking. He was cooking there at my place most of the time. I have seen Boulton over there on Dome too. I wasn’t much acquainted with him, but he used to drive points at Maddocks on the next lay, and I used to see him going up to see Williams at the cook house in the morning after he was through work. He was working nights. Once or twice he came to the boiler-house there and passed the time of day with me. I did not have any particular acquaintance with him. I first went down to Hot Springs in August; and then went down again in September, 1908. The second time, when I took the plant down there, Williams was—I don’t know whether he went on the same boat, but he spoke about coming down. He said he was coming down. He was going along with me. He wanted to know if there was anything doing down there, and I told him yes, and he came down. I can’t say for sure whether he came on the same boat, but he was there when I got there.

I told him he would get a job as soon as I had one when I got down there. He worked for me a few weeks and for awhile in the fall, and during March and until September, 1909. He cooked that summer. I was working a lay over on Cache Creek. That is where my home is and my mining operations. I gave Williams and a man named Johanson a lay in 1909. I went out in the fall and turned the lay over to Williams and Johanson, *Johanson was my old partner on Dome* and they both wanted to take it over when I went out, to work that winter, so I turned the plant, and stuff I had there in the mess-house, wood and everything over to them and left them a little credit at Morrison's besides, to help them to start. Neither one of them had much. Williams had a little more than Johanson had at the time. They worked that lay for pretty near a year; I think they quit about August, 1910. The results were bad. That is, they hadn't made anything themselves, and they had been working hard there, and they were in debt when they got through. There was something between six and seven hundred dollars still owing to me. Then there were some other debts left around besides. They quit the lay. I returned in the spring of 1910, about the 2d or 3d of April. I was over on Cache for about two months. I guess in my own place, but I got hurt and went to the hospital, and was in Gibbon a good deal of the time that summer. I was living in the same mess-house and the same place that Williams and Johanson did and had a cabin close by there, adjoining. *We had a telephone there.* The phone was there when I got back from Gibbon. I paid my share so the phone from that time on was a kind of *a partnership phone*. I guess Williams and Johanson paid for it until that time." (Tr. 190-193).

“I was not in partnership with Johanson and Williams, there was no partnership between them and me” (Tr. 193).

“In the spring of 1910, Williams and I had a conversation about Jack Boulton; he told me he had a letter from Boulton, who had a lay down in the Iditarod, a pretty good lay, he thought, on Flat Creek. He *didn't* say a good deal about it. But it was supposed to be a good lay, and *I guessed it was* in a good location from what he said, because the *general reputation* from that part of the country *was good*. I guessed that. Williams told me *some* of it (Tr. 193). I asked Tom Williams who was going there to see what kind of a lay Boulton had. At that time I had a lot of ground on Cache Creek and some of it *I could* go to work on. I had plenty of machinery. After I got back from the hospital in the fall of 1910, I wanted to sink a few prospect holes as it was too early to start tunnelling; some ground there I wanted to work that coming summer and open up in the spring. Just then I was preparing to sink a few prospect holes on some ground there that *I didn't know* whether there was anything in it or not. I owned quite a lot of ground there, some 15 or 20 claims, that is some kind of an interest, some small, some half or a little better” (Tr. 195).

“I received that telegram up at—I happened to be in Howell & Cleveland's mess-house at the time when I heard our ring on the phone—the ring we had down at the other place—so I took it down there, that is, took the message down on a piece of paper there. That was along towards evening. And I stayed a little while, until I went back down to our own mess-house where we stopped, and I don't—at the time I don't think Williams was in the house when I went in. I think he came in a little while afterwards, though, and when he

came in, I showed him this telegram and he read it. And I can't go into very close details on it, but I made this remark, that I didn't think this telegram was meant for me, and asked him if he didn't think it was meant for him. And Williams said he didn't know but it might be. I am telling you the general talk. We might have talked half an hour. Anyway, I said that I wouldn't for my part send any money to anybody on a telegram like that, to Boulton or anybody else. And he—let's see. So, anyway, finally I told Williams that I didn't want to go down or send any money down; if it was meant for me, I didn't want anything to do with it whatever. Then I asked Williams if he would like to go down there, and he said yes, he would like to go down, 'But what is the use? I have not got anything to go down with.' I says, 'Well, if you think you could do yourself any good by going down there I would give you the money to go down.' He thought a minute and then he said he would, being that he knew Jack so well and everything—he thought he could make a good deal, and decided there that he would go that evening. And I intended—the next day I was going to come up to Fairbanks anyway, as I had to get some more machinery, and I was going to leave the next day for Hot Springs, and I left the place about 9 o'clock. (Tr. 196-197).

Williams went to Tofty to see Merrifield, who had come from the Iditarod (Tr. 197).

I gave Williams some currency and also \$2,300. The check is dated Sept. 16, 1910. My account at Fairbanks was not enough to cover that check, and I was coming up to make it good. It was evident from the telegram there was something wrong about this Boulton interest, some trouble, and Williams in leaving said he would thoroughly investigate the condition

of this lay before he would put any money into it after he got down there. I just gave him this money to give him a start down there (Tr. 198-200). I staked him to it. He did not say anything about being partners or working mining ground down there or anything after that. I had a little left at that time. *Williams had been along with me a long time* (Tr. 200) and I always tried to help him out and I would like to see him make something. He said that I could depend on him, that he wouldn't put a dollar into that ground unless everything was clear and he could see his way through with the money he had; and besides he says: 'I appreciate your kindness in giving me this money to go down, and I will do the right thing by you.' I never told him that if he needed more when he got down there I would go stronger than I had already (Tr. 200). Nothing was said of giving him more money. If the \$2,000 was not sufficient to go into that deal that he would not go into it. The \$500 he was to use for his fare, clothing and grub. He left on the boat and I on the steamer for Fairbanks. On the boat I met some people who had a better idea of what the conditions were in the Iditarod. I never knew before the conditions there, and I wrote that letter of September 16th (Tr. 201). I never had any correspondence with or any notice from the bank, or Williams or anyone else up to September, 1911, about this note of February 24, 1911. I had some talk about or had some letters with reference to the note made out in October, 1910; I had written several letters with reference to that note, and two of them are here, already in evidence (Tr. 203). There was another letter of December 16, 1910, by me to Williams about his having signed my name to that note of October 6, 1910. I know I put this sentence in that letter: 'I will not be re-

sponsible for any notes or whatever else you may have signed my name to. Now let me know as soon as possible if you have revoked the same.' Williams sent me a deed to sign and swear to it and I did so and sent it back to him (Tr. 204). I received the first letter about December 5 or 6, informing me that he had taken an assignment of the lay in both our names (Tr. 204-205). I believe it was December 28, 1911, that I found out from the bank that Williams had signed up a note in my name of February 24, 1911. I received that letter in San Francisco; that letter was from the bank here (Tr. 206). I got Williams' letter of October 24, 1910 (Tr. 38-43), on the 7th or 8th of December, 1910, and I remember the information in that letter, and I replied (Tr. 44-47) on December 8, 1910 (Tr. 209). When I came back from San Francisco in 1912, I stopped 4 or 5 days in Fairbanks. I was then doing business with the American Bank of Alaska and for nearly a year before I saw Mr. Hurley at that time in the bank. I went to the bank there, and told him the same thing as I told him in the letter from San Francisco—that I didn't see why he could expect me to pay the note; that I had nothing to do with it, and never authorized anybody to sign it, or anything of the sort—Williams, or anybody else—I told him that I never had a partner or anything in the Iditarod, Williams or anybody else (Tr. 211). I was sued about the 4th or 5th of September, 1912. I knew Morgan on Dome Creek. I knew he was in the Iditarod, that he had gone down there; I can't say when (Tr. 212-213). I never said to Egler what he testified to, that I was \$6,000 in that; I might have had conversations with Egler along that line. I never had that money involved in the thing down there at all. I was in Tofty or Sullivan Creek in 1911 (Tr. 214-215).

Boulton was just an acquaintance of mine. I couldn't be sure, but I think *there was a telegram* sent to Boulton about September 16 or 17, 1910, that Williams was on his way down with money from Hot Springs; but *I don't know whether I sent or Williams sent it* (Tr. 215). I gave Williams this money and told him to go down there and do as he pleased with it—*Williams was to use his own judgment*. He decided to go; I asked him if he would like to go down, and arrangements were made, and I, of course, gave him—we had some talk, and he got the money and went down; and he was to use his own judgment, of course (Tr. 216). I told him to use his own judgment; he said he would inquire into the matter and see that it was all right before he put it in; this was after the discussion took place; he was to investigate the matter, and if he thought it was proper for him to go into the thing after he investigated the condition of the lay, that he could put the money into it and carry himself through, and he was going to put it in, otherwise he would not put it in at all, that he wouldn't put a dollar in (Tr. 217). I never said anything about me going further. I got Sam Campbell to take Williams down to Gibbon. I didn't want to see Williams go down to Gibbon alone in a small boat. I hired and paid this man to take him down. Mr. Curtis had a wire that the last boat was going to leave Gibbon the next day and the only way to get there was for Williams to go down in a small boat, and I sent the boat down and had it brought back, and I paid the man's expenses down and back to Hot Springs on the steamer with the boat, in addition to the \$2,500 (Tr. 218).

I expected Williams to make good sometime, if he made it. I did not expect any share of the profits of the venture, *only what Williams*

said that he would do the right thing. If he made it, I guessed Williams would do the right thing by me; if he didn't it was all right with me. My idea was he would pay back the money whenever he could make it (Tr. 219). I wrote all the letters that are in evidence here (Tr. 221). If he made anything I at least expected he would pay interest at least. It was all up to him. I didn't stipulate with Williams to pay me anything back no more than I expected to get this money back *and something for the use of it* (Tr. 222).

But I had this understanding at the time as to both of us, as to this trip being *for the mutual advantage of both of us* at the time Williams left Hot Springs. I presume that is correct, and I so testified at the last trial. I could not tell what would be the outcome of it. *I hoped it would be to the advantage of both of us* (Tr. 222).

When Williams' letter came advising me that he had deposited this money in the American Bank of Alaska *and had borrowed on a note signed by yourself and him* the sum of \$3,500, *I did not notify the bank* that that proceeding was not considered correct by me. I had no notification from the bank myself; and *I did not notify the bank* in any manner, in writing or by word of mouth, until January 2, 1912. When I got their first notification on December 28, 1911, I immediately wrote back denying it (Tr. 223). I was in Fairbanks in September, 1911. I didn't know there was anything in the bank against me. *I did business with the bank all that summer* (Tr. 224). After I wrote Williams and received his reply I didn't consider I had anything to do with it. *Williams told me* in his letter of April 4, 1911, that 'I sold the half interest in the lay for just enough cash down to pay the back interest on the note,

\$400.' I never knew the note was renewed (Tr. 226). I understood there was a note, that first note (Tr. 227). I received advice from him that he had signed my name to that \$3,500 note. I got that advice in a letter (Tr. 229). Egler and I are good friends and are partners in some mining ground around Hot Springs (Tr. 231).

I wrote Williams advising him to be very careful about his deals down there, otherwise *we* will be in lawsuits head over heels. I did not want to see Williams get into lawsuits or get into any trouble whatever; if he did he would be jeopardizing that money I gave, and he would be up against it, and would be calling on me to pull him out (Tr. 232). By '*we*', *I meant myself—I am interested*, so far as I furnished him with this money. And if Williams gets into trouble and jeopardizes this money, he is going to make a hallo *and call on me* to help him out. I suppose I was included in '*we*'—*Williams and myself*, so far as this money went. By '*we*' I meant Williams and myself (Tr. 233). I rang up Tom Williams on our telephone; it was not then but was afterwards in the name of *Richards & Williams* (Tr. 234). When Tom Aitken asked me about the note Williams gave him, and I told him I have not heard a thing from Williams. I don't know a thing about it (Tr. 237). I never did hear of that note of February 24, 1911, until I got that notification in San Francisco on December 28, 1911, and on January 2d, 1912. I immediately replied and repudiated that demand for payment of the note, and I did the same thing here in Fairbanks personally to Mr. Hurley, in April, 1912 (Tr. 240). Egler and I are interested in ground together as joint owners, but we are not partners (Tr. 240) in different claims."

The following spring after Williams went to the Iditarod, Richards and Joseph H. Egler had a conversation on Tofty about mining matters. Richards was then mining on Cache Creek and Egler was mining on Tofty. Richards wanted to know if Egler didn't want to take up that proposition in the Iditarod off his hands. Egler asked him what it had cost him and he said, "I am in about \$6,000." Egler told him he couldn't handle it (Tr. 149). Richards and Egler are partners in other mining properties, are partners in some ground on Cache Creek and have always been good friends (Tr. 151). Richards said to Egler that he was in about \$6,000. Egler and he were then partners (Tr. 153).

C. J. Hurley was president of the American Bank of Alaska, and met Williams on the Iditarod in the fall of 1910. In September, 1910, Thomas Morgan brought Williams to the bank and introduced him to Hurley as a man who would probably want to transact some business with the bank. Shortly after that Williams opened an account with the bank (Tr. 158). He told Hurley that the money he had to open up the account with was given to him by Richards and was Richards' money; that Richards had sent him down there to look up some proposition, to see if he could get into something; that they were partners together (Tr. 160). He asked Hurley's advice how to transact the business, the partnership affairs, and Hurley advised him to open the account in the name of Richards & Williams. He deposited \$2,100. After that he applied

for a loan of \$3,500 on the understanding that he and Richards were partners in that down there (Tr. 161). A loan of \$3,500 was made in the name of Richards & Williams (Tr. 162). Hurley knew Richards' standing and had known him ever since he has been on this camp (Tr. 163). The note for the loan was for 90 days to give Williams time to write up to Richards for the money (Tr. 163). Williams said that when he left Hot Springs Richards gave him \$2,500 and that if he got into something that required more money, to let him know and he would send it down to him. That was the reason the note was made for 90 days (Tr. 164). When the note was about to mature or after that—Williams was on Flat Creek all the time—and when Hurley saw him in town he called his attention to the note being past due and Williams said he had not yet heard from Richards and was unable to take it up; next time he saw him, he said he had heard from Richards and Richards could not spare the money at that time, that Richards was in poor health and making arrangements to operate on a large scale at Hot Springs, and that Richards could not come down himself (Tr. 164). Hurley took a *renewal* of this note on February 24, 1911, for \$3,500. No money was paid, and the stamp paid was put on only because it was paid by this *renewal* note. There was no cash transaction in connection with it. The "paid" stamp was put on the old note just merely to cancel it, so the bank would not be holding two notes, and the old note was surrendered.

The note in suit is the *renewal* note. The interest was paid at the time the renewal note was given; also took a mortgage on their interest in the lay on Flat Creek (Tr. 165). Williams executed the mortgage in the name of Richards & Williams (Tr. 1667). No part of that note has ever been paid, and the interest is \$1,295 to March 24, 1914. The lay covered by the mortgage was closed down in the fall of 1911, and the note was then sent to the American Bank of Fairbanks for collection (Tr. 168-169). Between October 6, 1910 and October 6, 1911, the American Bank of Alaska did not nor did Hurley receive any communication from Richards (Tr. 169). Hurley knew Richards and his financial standing but didn't know Williams and would not lend Williams any money. Williams said Richards sent him down there to become interested in mining, and Dick Richards was his partner, and he got the loan to buy an interest in the Boulton lay on Flat Creek. He said he had sent him down there to become interested in mining interests. That would make him a mining partner (Tr. 172). Hurley inquired of Morgan who knew Richards and Williams, and Morgan said it was his belief that they were partners. No other inquiry could be then made as there was no telegraph station there and it would take two months to telegraph and get a reply; and the loan was made on Mr. Richards' name (Tr. 173). Hurley would not have loaned Williams money on his own name, and the Miners & Merchants Bank wouldn't have loaned him any

money on Richards' name (Tr. 174). Hurley never notified Richards about either note (Tr. 176). There was no agreement to relieve Richards when Hurley took the new note and mortgage; they were taken in the names of Richards & Williams (Tr. 178). Their lay was on a creek where there were valuable mines. Boulton borrowed \$1,500 on his half interest in that lay before this loan was made; bank wouldn't loan any more; that was in September, 1910 (Tr. 179). Hurley knew that the assignment of this lay had been taken in the name of Richards & Williams (Tr. 182). Williams did send a bill of sale to Richards and Richards sent it back to Williams, executed; but Hurley had never had anything to do with it and had not agreed to release Richards (Tr. 183). The new firm was called "McKenzie, Williams & Company"; they had been depositing gold dust, as much as \$50,000 and drawing checks for their debts (Tr. 187).

Hurley told Richards in Fairbanks, at the bank, in the spring of 1912, when he repudiated the note in suit, that if that was his final decision the bank would sue him (Tr. 245). Hurley told Richards that he was going down to the Iditarod and would see if he could realize anything on that lay if it had not been abandoned and let him know. He subsequently found they had abandoned it in the fall of 1911; that is why suit was delayed until September, 1912, on this note (Tr. 246).

The foregoing is *the evidence* upon which this case was tried to the *jury*, on its *third* trial, resulting in a verdict for the defendant in error.

Argument.

The learned counsel for the plaintiff in error, in their "Brief for Plaintiff in Error," assert *twelve* points for a reversal, *seven* of which attack the *charge* of the Court to the jury, *three* relate to *refusals* to instruct the jury and in *modifying* requested instructions, and the remaining *two* to rulings of the Court refusing to admit in evidence *two* letters, *one* from Williams to Richards, the *other* from Richards to the bank.

The *entire* charge will be found in the transcript, pages 247 to 256.

In *McBride vs. Neal*, 214 Fed. 966, 968, the Circuit Court of Appeals for the Seventh Circuit, citing a number of cases, said:

"If assignments of error are to be based upon the legal sufficiency of the evidence to support a verdict, motions to that end must be made at the conclusion of the evidence and exceptions preserved to adverse rulings thereon."

In the case at bar all of the exceptions to the charge fail to state the thing charged or the facts included or excluded in the *part* excepted to which is asserted to be erroneous, and such an exception is bad. In *City of Charlotte v. Atlantic B. Co.*, 228 Fed. 456, 462, the Court said:

"The rule is too familiar to require the support of citation that, where the charge excepted to includes correct statements of the law with others that are incorrect, the exception is insufficient to sustain an assignment of error."

I.

The learned counsel for plaintiff in error open the "Argument" in their brief with the statement (p. 24) that "the case was tried by plaintiff on the *theory* that while Williams had no authority as a mining partner nor in virtue of any written power of attorney to sign Richards' name to the notes or to any other writings, yet that Williams having executed the note of October 6, 1910, with an understanding that it was to be renewed, if so desired (and of which understanding there is no foundation in fact in the evidence), and Richards having been notified by Williams of the making of the note of October 6, 1910, and never having repudiated the first note *to the bank*, that he was liable on the renewal note notwithstanding he never heard of it until December 28, 1911."

We have already set out the full evidence in the case, wherein it is established by the evidence that he gave Williams \$2,500 and hired and paid a boatman to row him out to catch the packet and sent him down to the Iditarod to examine the Boulton lay, use his own judgment and invest the money given him in mining property there and work whatever he purchased, telling Williams: "We will go stronger than that if there are no complications with that ground, and they to be partners therein as Williams testified and as the acts of Richards and Williams showed; that Williams did as Richards had instructed him and after investigation of

the Boulton lay, used his own judgment as Richards had told him to do, negotiated a purchase of and purchased three-quarters of the Boulton lay in the names of himself and Williams as "Richards & Williams"; and not having enough money to pay for what he purchased, obtained the loan of \$3,500 from the defendant in error bank to complete the purchase and pay for the mining property purchased by him, giving the bank therefor a note in the name of Richards & Williams, payable in 90 days and dated October 6, 1910; told Hurley of the bank he would immediately notify Richards and on October 24, 1910, Williams *did* notify Richards *fully of all* he had done (Tr. 38-42). In this letter, Williams tells Richards the *whole story*, and especially does he tell Richards:

"Now Dick, how I got the money is the hardest part for me to tell. You may be angry, but I did not do it with any selfish motive or trying to take advantage of the kindness you did for me; yet, *if I had received your letter*, which I did 4 days ago, *I don't think I would have bought it, but it was too late* (Tr. 39-40).

Williams then says that he went "to the American Bank of Alaska (the defendant in error here) and borrowed \$3,500 for three months at 1%, *with the understanding that it is to be renewed* if it is not convenient to pay *when due* (90 days)"; that he signed "*the note Richards & Williams*"; that

"It is a proposition *you can't lose on*. *If you don't make \$20,000 out of it I will miss my guess*. You say you want to be on the ground

yourself and I assure you I want you to come down; in fact, you have got to come as it requires money to do business in this camp."

and (Tr. 41):

"That is the reason I want you to come down. I know, Dick, this proposition *places you* in rather an awkward position and I sometimes wish I had never gone into it when I think of the position it *places you in*";

and (Tr. 42):

"Now, Dick, whatever I have done I hope will meet with your approval, as I want to do what is right by you."

This *letter* was received by Richards, he admits, explaining and describing *everything* that Williams had done, including the \$3,500 borrowed, the *note*, signed "Richards & Williams," and *with the understanding that it is to be renewed* in 90 days if not paid, and yet the learned counsel for plaintiff in opening the "Argument" in their brief say: "And of which *understanding* there is *no* foundation of fact in the evidence" (Brief, p. 24).

Now, what does *Richards* reply, in his letter to Williams of December 8, 1910 (Tr. 44-47)? Does he *repudiate* any act of Williams? Does he *deny any partnership*; does he question Williams' authority to use his name at the bank, or that *he is not* interested in the deal, or that he will *not pay*, etc.? Richards writes:

"Received your registered letter last night, 7th, and other *two* letters Monday night, 5th. When you address me Hot Springs, the letters

go there first. I was rather surprised on reading your letter. *You are going some.* I did not see T. Aiken. I heard he went past here 2 weeks ago, so I called him on the phone at Hot Springs. He told me you purchased $\frac{1}{2}$ interest in the lay, and he thought it was *good* ground, *asked me* if it would be *all right* about some *money due* first of June, so I told him I didn't know a thing about anything, *as I had no word* whatever. He thought I would have been informed about it and that was all. As I said I was surprised as its been so long since you left I would have knowed something *before*. First of all, I want to ask you as you say nothing about it, is that 5.00 or 8.00 ground located *on that lay* * * * I hope you have it there. Regarding coming down there * * * it would be impossible for me to leave this place, unless I was rid of everything here, and if I came down there to work ground, I would certainly bring my machinery down. * * * *I realize* you have put yourself under considerable obligations. *What on earth did you make all them due in three or four months, come due in the heart of winter, when there is no possibility to raise a dollar?* Regarding that account at the bank *in both our names*, that is certainly *a mistake*. *When* I gave you a check for the money and you gets a letter of credit on it, my name should not be used at the bank. I never had the least idea you should *assume any obligations beyond what would relieve the situation* and what Jack called for at the *time*, and now when I see Jack gets some of the money and takes to the woods. Well, now Ed, to make this short, I believe the best way out of this, you should *try* and get some of them moneved fellows *down there* to go in with you. *Consider me out of it altogether*. Doubtless you should have no trouble *in doing* business with that kind of ground, and with people there

that knows it. *I figure I have as much at stake here, although I may have nothing * * ** and I am having a little *anxiety regarding my head*. I don't know but ** * ** am liable to be required to seek *medical* aid any time, so it wouldn't do *for me to be there*. There is a mail leaving. ** * ** I don't know how long it will be getting there. *I realize Ed, you mean all right*, and I sincerely hope you will make out all right. When I said I would like to be on the ground myself, I meant it, in so far when *it requires so much expense to start*, as it seems to there. At the same time I had no thought of coming down there, *at the time*, as I thought *you and Jack capable of working any ground* if you try. ** * ** So, I went ahead contracting obligations here and must stay with it. *If you manipulate another deal*, it would be better to have the bill of sale made over from the old laymen. ** * ** It seems to me you could easily make some transaction to advantage on that kind of ground. *I don't care to go any more*. In fact I can't at present and the only way *I would do any more* would be bringing my plant down. I wouldn't think of buying machinery" (Tr. 44-47).

This letter was written by *Richards* December 8, 1911, and yet he had *previously* on September 21, 1911, written *Williams* a letter which *Williams* did *not* receive until *after* (22 days *after*—Tr. 40) he had borrowed the \$3,500 from the bank (Tr. 50); and in this *previous* letter *Richards* stated he had met people on steamer and writes *Williams*:

"Jack has a promising lay on the Wild Cat, but from what they all say, its in a complicated condition. He has partners; several complicated transactions has occurred, and I don't

believe it advisable *for us* to go into it. *We* couldn't get no interest of any value, and its going to take a good deal more money to handle it than what you have, possibly not now but in the future. * * * And I don't care to go into it that steep, *unless* I could be on the ground to attend operations myself, *so if you have not interested yourself in it by the time you get these lines*, I would advise you to call it off as far as *I am concerned*. Keep enough money to secure yourself, *and return balance to my credit* at N. C. Hot Springs, through a draft like you had (Tr. 48-49). * * * *But if you have already invested anything in it*, I trust you have investigated all those complicated transactions that lay has underwent. Otherwise we will be in lawsuits head over heels. Of course, \$7.00 ground *is good enough* for anybody at that. * * * *You will learn the facts better right there on the ground far better than I can, so use your own judgment accordingly*" (Tr. 49).

So that, even in this *previous* letter of September 21, 1910, Richards winds up by again telling Williams that he is on the ground and knows the facts better, and "*So use your own judgment accordingly*" (Tr. 49).

Then the letter of Richards of December 8, 1910, is written, as above quoted in part, *after* he has received Williams' letter of October 24, 1910 (Tr. 44-47), in which Williams reported to Richards fully everything that had been done by him in the Iditarod.

Now, *after* Richards had written Williams these *two* letters of September 21, 1910 (Tr. 48-49), and

December 8, 1910 (Tr. 44-47), and had received between the time of writing them Williams' *long* letter of October 24, 1910 (Tr. 38-43), *Richards again*, on December 26, 1910 (Tr. 51-52), writes Williams:

"Regret to note you discern me to doubt your honesty, *which I wouldn't* or ever meant anything to convey that impression. What bothered me was to have these fellows come after me for the money which I did not know anything about. * * * Its certainly *I am not going to worry* anything about. *Since you put the money into it, go to it and make something out of it.* I imagine the proposition *must* be all right. I would be only too glad to come down there if I was footloose here, but you know my position here as well as me. * * * *As you know* I looked at *the thing to be of mutual advantage to both of us*, but I did not calculate on putting more money than you had. * * * I *had* no intention of going any further, as I took it for granted in getting that amount Jack could carry along, *but that don't hurt the proposition any, if its good, its good.* I can believe you as well or *better* than anyone else I talked with regarding it. Remember, Ed, in all your letters you have said nothing about the prospects in that particular piece of ground, only that you believed there was \$150,000 in it. However, its immaterial if there was a million in it, and I hope there is, I have done too much preparations here to leave being you have that much money invested already you should have no trouble in getting someone interested to carry the thing through. *Go at it and make something out of it, and don't worry about my part*" (Tr. 51-52).

And as late as September 12, 1911 (Tr. 58-59), Richards telegraphed Williams: "Buy Curran

quietly eight below Dome Creek five hundred cash money American Bank. *If possible sell and come.* Answer. Edwin Richards" (Tr. 58-59). Richards admitted that the telephone at his cabin on Cache Creek was under the name of "Richards & Williams" before Williams left for the Iditarod, a partnership phone (Tr. 193; 234-235); Williams, too, so testifies (Tr. 136-137).

Richards also testified at the last trial:

"Q. But you had this *understanding* at the time as to both of you, as to this trip being for the *mutual advantage* of both of you at the time Williams left Hot Springs. Isn't that correct? A. I presume so.

Q. Wasn't that your testimony at the last trial? A. Yes, sir. I could not tell what would be the outcome of it. I hoped it would be *to the advantage of both of us*" (Tr. 222).

The note sued upon was dated February 24, 1911, and is *a renewal only* of the note of October 6, 1910, which *original note* Richards was fully informed about and *never*, even to this day, repudiated or questioned Williams' authority to execute, neither to the bank, nor to Williams; nor even in this record can testimony of Richards be found denying or questioning the authority of Williams to borrow the \$3,500 from the bank and execute the note of "Richards & Williams" therefor on October 6, 1910.

Richards was told by Williams in his letter of October 24, 1910, that this loan of \$3,500 had been made by Williams and the note given "with the

understanding that it is to be renewed in 90 days''; he knew Williams would have to execute a *renewal* note in 90 days and it was undoubtedly Richards' legal duty to notify the bank, or be estopped and bound by the execution of the new note.

His only pretenses are that the bank had never notified him and he hadn't *expected* to put in more money than the \$2,500 he gave Williams when he sent him down to the Iditarod to make the purchase of the Boulton lay, telling him to use his own judgment; and even *after* Williams had fully and particularly told him in his letter to him of October 24, 1910, about borrowing the money from the bank and signing the note "Richards & Williams," and the *understanding* that it was *to be renewed* in 90 days if it were not then convenient to pay it, he never notified the bank that Williams had even made a mistake in doing so, or that he would not be responsible or pay it, or that he was not liable for the money borrowed or on the note of "Richards & Williams," or question the authority of Williams to make that note, nor did he ever notify the bank or Williams that Williams and he were not partners in that mining property purchased.

The letters of Richards alone establish beyond a doubt that he and Williams were mutually interested in purchasing and working the Boulton lay and that they had that understanding when he sent Williams down there to purchase it; they were partners, they were mining partners in that Boulton lay.

When Richards received Williams' letter of October 26, 1910, telling him that he had borrowed \$3,500 from the bank to purchase the Boulton lay, and had executed the note of "Richards & Williams" therefor, and that the understanding was that the note would *be renewed* in 90 days if it were not convenient then to pay it, it was the absolute and unquestioned duty of Richards to notify the bank promptly that Williams and he were not partners, that Williams had no authority from him to borrow money and sign his name to or execute in the name of "Richards & Williams" that note and that he would not be bound thereby or pay the note. Had Richards done so, the bank would not have *renewed* the note and could at once have proceeded against Williams and the Boulton lay for its money, as that lay was then valuable, being worked and paying; but instead of doing so, Richards was himself dealing with the bank during that time, never even mentioned or raised a question concerning the note to the bank, or even to Williams, and *lulled* the bank into the position in which it was when it was compelled to commence this action upon the renewed note.

There was no question raised upon the trial, by objection or ruling that is reviewable here, that there was any *variance* between the pleadings and proof, or that the evidence was not within the issues made by the pleadings, and it is too late now to make such an objection, when Richards and his counsel have the verdict and judgment against

them upon evidence sufficient to sustain both, and with the pleadings *aided by the verdict and judgment* so that, if such issues were necessary, their acquiescence when they should have objected, leaves the pleadings *aided by the verdict* to sustain the judgment.

Nashua S. B. B. v. Anglo-Am. L. Co., 189
U. S. 221, 47 L. ed. 782.

II.

The next contention (pp. 25-33) of the plaintiff in error is that the Court erred in its *charge* to the jury, and the learned counsel select a *part* of that charge, and assert that it *assumes* a state of *facts* and a *theory* not shown by the record or advanced by the plaintiff.

The charge will be found in the transcript at pp. 247-256.

The Court had already stated the *issues* raised by the pleadings (Tr. 247-248), and then states the *contention* of the plaintiff and the *contention* of the defendant (Tr. 248-249).

The record shows that *opening statements* were made to the Court and jury by both sides (Tr. 21), also from counsel's own *exception* to *part* of charge (Tr. 258), and to these *contentions* the Court refers, and they are *not* contained in the record; and the Court states: "On the part of the plaintiff it is *contended*" and "plaintiff further contends"

(Tr. 248-249). "On the part of the defendant Richards it is *contended*" (Tr. 249); and we submit that the absence from the record, the bill of exceptions, prevents counsel asking the Court to review the same.

That these contentions were the contentions of both sides is certainly true, as this record overwhelmingly discloses and it is unnecessary to take the time of the Court to point out a conclusion so self-evident.

The *exception* actually *taken* to this *part* of the charge is: (a) that it is *inaccurate*; (b) that *no* such claim was made or advanced; (c) that *no amount* except \$2500 was mentioned; (d) that *nothing* was said about *borrowing* more money, *as indicated by said opening statement*; (e) that it is misleading and confuses the two notes of October 6, 1910, and February 24, 1911 (Tr. 257-258).

This exception is first insufficient, and second, the charge is not subject to it; it refers to "*said opening statement*", and there is *none* in the record; how or in *what* respect it is *inaccurate*, the exception does not state so that the Court might make it accurate; which one or more of *claims* the exception refers to as not having been made or advanced is not stated, and that part of the charge states a number of *contentions*; *no amount* of money is mentioned in the charge, but simply that Richards agreed *to advance* a certain amount of money; this *part* of the charge does *not* say anything was said about borrowing, but simply states that Williams

did (as is admitted) borrow \$3500, and this part of the charge clearly refers to *both* notes by their *date* (Tr. 256-257).

The learned counsel state *again* that there is absolutely nothing in the transcript to show that any amount of money but the \$2,500 was spoken of and yet Williams testified: "If there is no confliction with that ground, *we will go stronger than that*" (Tr. 26).

It is difficult to understand the argument of counsel against this part of the charge; they seem to argue that the Court is telling the jury what has been *proved* by each side, while the Court is only informing the jury what each side *contends* that the evidence establishes; and it is ridiculous for counsel to argue that on behalf of the bank it was *not contended* that Williams was authorized *to borrow* money, or that there was not a partnership, or any other conclusion of fact or fact that the jury under the evidence could find, or that it could be error for the Court to tell the jury that plaintiff contended this or defendant that; and we are at a loss to know how plaintiff in error could be injured by the Court stating our contentions as to *what* the evidence established.

The Court *immediately* after this part of the charge, stated the *contention* of the plaintiff in error (Tr. 249).

Counsel say *Williams* was the leading witness for plaintiff, but as his evidence shows, he was an *ad-*

versary witness and Richards' personal friend endeavoring to favor Richards all he could; and then counsel quote (pp. 27-28) *their cross-examination* of Williams, as if they had forced him to admit something, when he was answering like a parrot to leading questions: "No sir, No sir, No sir, No, there was not," and to cap the climax his last answer, which they quote thus:

"A. I can't say we discussed about buying. I was just given the money and sent down there to use my own judgment."

But counsel *do not* state or quote what Williams *did* testify as follows:

"I was supposed to make a purchase. I was to use my own judgment, in reference to any transaction. If I purchased anything I was to work it I suppose" (Tr. 25). "I remember Mr. Richards saying in the store: 'If there is no confliction with that ground, *we* will go stronger than that'" (Tr. 26). "We talked the matter over, the Boulton lay" (Tr. 27). "Q. Did you *borrow* the money from Mr. Richards? A. No, sir" (Tr. 29).

The learned counsel overlooked the fact that the *jury* believed the evidence tending to show (1) that Richards and Williams had an understanding and agreement that Richards, who had money and was at Cache Creek, expecting to go to the hospital on account of trouble with his head and who couldn't go down to the Iditarod where Boulton had a lay which they believed to be good, was having trouble with his partners and offered the opportunity to get his lay, and Williams who had no money;

was a competent miner and could go down, that Richards would put up the money, Williams could go down and they would purchase and together as partners work Boulton's lay; (2) that they did not know how much money was required, but Richards would then advance \$2,500. Williams would go down, investigate and with authority to use his own judgment in the purchase, and Richards agreed, if there were no complications and Williams thought the proposition good, that Richards would go stronger than that; (3) that Williams found the Boulton lay good, no complications, but more money necessary to make the purchase; (4) as it was late in the season, would take nearly three months to communicate with Richards, and with Richards' authority to use his own judgment, borrowed the \$3,500, gave the note in the partnership name agreeing for a renewal in 90 days, bought three-fourths interest, took the assignment of the lay in the name of Richards & Williams, and immediately and fully wrote Richards, especially telling about the loan and the note and the execution in the name of Richards & Williams; (5) that Williams, while not expecting or possibly intending to go as deep and strong as that and so informing Williams, yet recognized Williams' authority to borrow and give the note, but not anticipating that Williams would consummate the purchase that way, did not repudiate or disavow the loan or the note or Williams' acts, but acquiesced in what had been done while wishing

Williams had not gone in so deep, and continued to retain his interest, but urging Williams to try and dispose of it, to sell out and come home; (6) that Richards ratified the acts of Williams, was estopped to disclaim liability, and should satisfy the obligation that Williams, with ample authority of Richards and for his use and benefit, had incurred to the bank; (7) that Richards urged the sale by Williams and executed and returned to Williams a bill of sale to enable Williams to dispose of the three-fourths interest which he and Williams owned and acquired in part with \$3,500 of the bank's money; (8) that Richards should be held liable for and to pay the bank; and finally, that the jury found all the facts and the letters and acts of Richards and Williams against them and in favor of the bank.

There is not a doubt, that had the operations of Williams as shown by the evidence turned out to be successful and that Williams had made \$100,000 in the transaction, but any Court would unhesitatingly hold Williams to be liable to account to Richards as his mining partner.

The whole argument of counsel is directed to the conclusion that the *jury* should have found a verdict for the plaintiff in error, instead of for the bank; but that question is not reviewable here; this is a Court of errors, and only reviews rulings of the trial Court occurring during the trial, and presumes everything in favor of and not against the verdict.

The instruction complained of is neither misleading nor erroneous in any respect.

III.

The instruction asserted to be erroneous in point "II," pp. 33-37, of their brief, is subject to the same considerations urged by us to the last point of the learned counsel.

The *exception* actually *taken* to this *part* of the charge is: (a) That the same is *misleading* in that it refers to a *general* partnership between Williams and Richards instead of a *mining* copartnership as set forth in plaintiff's *complaint*; (b) that it is *not* based upon any *evidence* in the case; (c) especially *that* part of it that authorized the jury to inquire whether any agreement between them contemplated the *borrowing* of money for partnership purposes; and (d) whether or not monies borrowed from plaintiff were *used* ("*used*" is not in the instruction) for such purposes (Tr. 258).

The exception is *insufficient* so far as it states the part of the charge to be *misleading*, as it is not stated *how* or in *what* it is misleading, so that the Court could convict its misleading feature as the Court does not say a *general* but a partnership as *alleged* by the plaintiff, and the *allegation* is of a *mining* partnership; and also in so far as it fails to point out what *part* of it is *not*, as admittedly *some* part of it *is*, based upon evidence in the case;

and the evidence in the case for plaintiff in one part is, that when Richards gave Williams the \$2300 in check and \$300 in currency, he told Williams: "If there is no confliction with that ground, *we will go stronger than that*" (Tr. 26), and "*to use his own judgment*" (Tr. 25, Tr. 216), and his *three* letters (Tr. 44-47; Tr. 48-49; and Tr. 51, 52) to Williams, as well as all of the other acts and statements of both, and Richards' acquiescence in and failure to repudiate the loan or the note or notify the bank thereof either in these letters until after a year and three months (Tr. 222-223).

The Court, in the paragraph of its charge immediately *preceding* this, stated fully and clearly the *contentions* of Richards (Tr. 249).

The instruction here criticized expressly says: "Any partnership agreement *as alleged by the plaintiff* (Tr. 249); and the complaint, as they said in their last criticism, alleges a *mining* partnership, as the Court *had already* charged in opening its charge and stating the issues (Tr. 247).

This argument of counsel is a good illustration of the *vice*, which the Courts constantly frown upon, the taking of *a part* of a charge and treating it alone, when if it be read with the rest of the charge, it is entirely unobjectionable.

Again, each one of the points made against this charge of the Court, goes not to a particular thing in the charge or in the part of the charge, but to a certain part of the charge, some parts of which

excepted portion, they do not question and which are not subject to exception.

Lindley says:

“A partnership may be formed by verbal agreement to acquire title by location to public mineral lands; but to create a partnership in working mines not even this is necessary.”

Lindley on Mines, 3d Ed., Sec. 797, p. 1960.

“Its existence is a question of fact.”

Lindley, Sec. 797, p. 1961.

Shea v. Nilima, 133 Fed. 209, 213.

“An express agreement to become partners or to share in the profits and losses of mining is not necessary to the formation of a mining partnership.”

Lindley, Sec. 797, p. 1960.

But counsel are in error when they suggest *here* that there is a *variance* between issues and proof; that question is not reviewable here in the absence of some request, objection or ruling *on the trial*; and in the absence of such objection, request or ruling the pleading is *aided* here by the verdict; counsel cannot sit by without objection or request for a ruling on the trial where the proof varies from the issue, and then complain in this Court that there is evidence which might support the verdict and judgment, but that there was no issue, that it was outside the issue; had they made the objection the issue could have been made.

It is not necessary that Williams and Richards should have been mining partners to support this

note; had they been general partners and this money borrowed for and used in their partnership, the note is supported; and had they not been partners at all, but merely principal and agent to purchase, with authority to use his own judgment as here, the note would be supported; and where the note is made as here, for a loan made to one who held the relation, whatever it might be, that Williams sustained toward Richards, a loan made as here, with full notice to Richards and no act of disclaimer or repudiation of authority of Williams to make the loan and note, and a ratification by subsequent action based upon such loan and the use of the money so obtained, as the act of Richards giving a bill of sale and urging a sale of mining property purchased and in part paid for with this *borrowed* money, there is authority, estoppel and ratification.

IV.

The instruction asserted to be erroneous in point "III," pp. 37-44, is subject to the discussion and considerations urged to the last two.

This is another *part* of the charge taken from its context, and is incorrectly copied and quoted in the brief, p. 37; see Tr. 249-250.

The *exception* actually *taken* to this *part* of the charge is: (a) That it is *misleading*, but fails to state how or in what so that the Court would be

enabled to remove any misleading feature; (b) *not* based upon any *issue* tendered by the complaint; and (c) or any *evidence* introduced upon the trial (Tr. 259).

In not pointing out in what it is misleading the exception is insufficient; the complaint expressly alleges the loan of \$3,500 (Tr. 4); “*such*” partnership refers to *the kind* of partnership, viz: *mining*, which the Court refers to as the “partnership agreement *alleged* by plaintiff” (Tr. 249) in the part of the charge *immediately* preceding this part, and again several times *before* in its charge (Tr. 247; Tr. 248); and as to it not being based upon *any* evidence *introduced* on the trial, the record is full of such evidence, as repeatedly heretofore and hereafter pointed out.

Again, the learned counsel quote Williams’ testimony and say he was *forced* to admit on *cross-examination*: this personal friend of Richards and an adversary witness for the bank, being *forced* to admit something *favorable* to Richards is humorous; but unfortunately for the counsel, the jury did not believe Williams or Richards as against their own acts and letters.

Then counsel *again* inadvertently overlook the record facts and make positive statements as to facts not being shown, when a perusal of these wonderful *letters* of Richards and Williams would put them correct and restrain the positiveness of their statement.

For instance, counsel say: "there is *nothing* to show that any *renewal* of the *first* note was ever contemplated *even* between plaintiff and Williams" (Brief, p. 38). We quote the record thus:

"So I goes to the American Bank of Alaska and borrows \$3,500 for 3 months at one per cent, *with the understanding that it is to be renewed* if it is not convenient to pay when due 90 days" (Tr. 40, letter of October 24, 1910).

Counsel quote Williams' testimony on p. 40 of their brief, and inadvertently leave out between two questions and answers, that is between the 4th and 5th questions on page 40, following:

"Q. Hurley wanted you to send down there and have Richards to deed to you so that you could have the full legal title that $\frac{3}{4}$ interest?

"A. I *can't* say that Mr. Hurley asked me to do that.

"Q. You and Hurley agreed that you were to do that?

"A. Not necessarily, but me" (Tr. 102).

The quotation in the brief, p. 40, is *not as strong* with these few lines from the record interpolated.

Counsel says there was a *dissolution* of the mining partnership by the *intention* of the parties in the letter of December 8, 1910; but there was not, as a perusal of that and Richards' subsequent letters will show, and especially his telegram of September 12, 1911: * * * "If possible sell and come" (Tr. 59).

Until the bill of sale was signed and sent by Richards to Williams, there was certainly *no* disso-

lution of the partnership, and this bill of sale must have been signed and sent by Richards long after April 4, 1911, because Williams' letter of that date to Richards *states* that the bill of sale *is enclosed* (Tr. 124); so that the question of dissolution made by counsel and its effect on this note, cannot exist on this record.

V.

Counsel on page 44 of their brief, question the correctness of another *part* of the charge under their point "IV," p. 44.

The *exception* actually *taken* to this *part* of the charge is: (a) that it is *misleading* without stating wherein it is misleading; (b) is not based upon any *issues* made by the pleadings; (c) is not applicable to *any theory* of the case made by the pleadings; and (d) is not based upon any *evidence* introduced or heard at the trial (Tr. 260).

Admittedly some part of *this* part of the charge is *not* misleading, is based upon issues made by the pleadings, *is* applicable to *some* theory of the case made by the pleadings; and *is* based upon *some* evidence *introduced* or heard at the trial; and that is *all* this exception states. It is clearly *insufficient*, as it points out to the Court *nothing* wherein the charge is not proper, to enable the Court to correct it at the time, and *that* is the *only* purpose of the rule requiring exceptions to the charge.

They say: "It is difficult to point out any one phrase or portion of this instruction as error" (brief, p. 45); and then state: "It is the instruction as a whole that is misleading and vicious."

Their criticisms are again based upon their own statement of the instruction's meaning, first as a *mere part* of an entire charge disconnected from the whole charge, and their again positive but again inaccurate statement that the instruction is not founded upon and that there is *no evidence* in the record justifying it.

Again they mistakenly but positively say:

"The vice consists in the practical assumption that there was evidence going to show that Richards authorized Williams to borrow money for the so-called partnership. No evidence of any such authorization is attempted to be shown in the record" (Brief, p. 45).

We refer the Court and counsel to the evidence of Williams after having given him \$2,500:

"If there is no confliction with that ground, *we will go stronger than that*" (Tr. 26). "I was supposed to go down there and *use my own judgment*. I was supposed to make a *purchase and work* anything I purchased" (Tr. 25). "But *if you have already invested anything* in it, I trust you have investigated all those complications. Otherwise *we* will be in lawsuits head over heels. Of course 7.00 ground is *good* enough for anybody at that, and what I learned from others is *not* to be depended on. You will learn the facts right there on the ground far better than I can, *so can use your own judgment accordingly*" (Tr. 49, letter of Richards to Williams, September 21, 1910).

Then Richards received Williams' letter of October 24, 1910 (Tr. 38-43), telling Richards *fully* and particularly *all* about him *borrowing* the \$3,500 from the bank and executing *the note* in the name of "Richards & Williams" to get sufficient money *to purchase* the three-fourths of the Boulton lay (Tr. 38-43); and followed by Richards' letter of December 8, 1910, in *answer* to Williams' letter containing his *full* statement of everything he had done. In this letter, Richards opens by saying:

"I was rather surprised on reading your letter. *You are going some.* I did not see T. Aiken. I telephoned him at Hot Springs. He told me you purchased $\frac{1}{2}$ interest in the lay and *he* thought it was *good* ground, asked me if it would be all right about *some money* due first of June, so I told him I had no word whatever. He thought I would have been informed about it and that was all. As I said, I was surprised as its been so long since you left I would have knowed something before" (Tr. 44).

Richards had previously in this letter said the letter was delayed by going to Hot Springs and *should be addressed* to Tofty from that direction (Tr. 44). This letter continues thus:

"*I realize* you have put yourself under considerable obligations. *What on earth* did you make *all of them due in three and four months*, come due in the heart of winter, when there is no possibility to raise a dollar. Regarding that account at the bank *in both our names*, that is certainly *a mistake*. When I gave you a check for the money and you gets a letter of credit on it, my name should not be used at the bank. I never had the least idea you should assume

any obligations beyond what would relieve the situation" (Tr. 45). "If you manipulate *another deal*, it would be better for you to have the bill of sale made over from the old laymen" (Tr. 46).

And in Richards' letter to Williams of December 26, 1910 (Tr. 51-52), he writes:

"*What bothered me* was to have these fellows come after me for the money which I did not know anything about. * * * Its certainly I am not going to *worry* anything about it. *Since you put the money in it, go to it and make something out of it.* * * * As you know I looked at the thing *to be of mutual advantage to both of us*, but I did not calculate on putting more money than you had * * * *but that don't hurt* the proposition any, *if its good, its good.* I can believe you as well *and better* than anyone else I talked with regarding it" (Tr. 51).

Richards *admits he never* notified the bank. Richards testified:

"Q. Now when this letter came back from Williams advising that he had *deposited* this money in the American Bank of Alaska and had *borrowed on a note signed by yourself and him* the sum of \$3,500—*did you notify* the bank that that proceeding *wasn't* considered *correct* by yourself?

A. *No, sir, I did not.* I had nothing from the bank myself. I had no notification from the bank.

Q. Did you notify the bank in any manner, in writing, or by word of mouth?

A. *Not until January 2, 1912"* (Tr. 223-224).

VI.

Another *part* of the charge is asserted to be erroneous in their brief, under their point "V," pp. 46-51.

This *part* of the charge is subject to the same suggestions pointed out by us in our former discussion, and is not erroneous.

There can be no question of its correctness under the evidence, and all of the acts and letters of both Richards and Williams.

In Williams' letter of October 24, 1910 (Tr. 38-43), Richards was fully and particularly informed of the borrowing of the \$3,500 and of this note and of everything done by Williams, and that the understanding was that it was to be renewed in 90 days (Tr. 40), and he never repudiated or questioned it or any acts of Williams, to the bank, until January 2, 1912 (Tr. 223), one year and about three months, although he was himself doing business with the bank, and on September 12, 1911, telegraphed Williams to get \$500 cash from this bank to buy "Curran" on Dome Creek (Tr. 58-59); and in Richards' *lengthy* letter of December 8, 1910 (Tr. 44-47), Richards does not repudiate or deny the act of Williams, *but acquiesces* therein.

Richards was expressly informed by Williams in his letter of October 24, 1910 (Tr. 40):

"So I goes to the American Bank of Alaska and *borrow*s \$3,500 for 3 months at one per cent, *with the understanding that it is to be*

renewed if it is not convenient to pay *when due* 90 days" (Tr. 40).

Beyond a possible doubt, the *absolute duty* was imposed upon Richards to notify the bank of his repudiation if he did not acquiesce in and ratify Williams' acts, as Williams was acting either for Richards or both himself and Richards and with Richards' money; he knew, as Williams had told him all about the deposit of the money in and the payments through this bank, and had he notified the bank he would not be liable on or bound for the loan or to pay the note, or that he repudiated the action of Williams or that Williams was not his partner, or that Richards was not interested in the Boulton lay, the bank could have proceeded and undoubtedly would to endeavor *then*, not later when the lay was abandoned, to collect its money. "Possibly \$50,000" had been deposited from that Boulton lay in this bank after Richards had been given full notice and information of everything (Tr. 187). And Richards even made a bill of sale to Williams after this in July, 1911 (Tr. 137). Everything looked and was good on that lay until the middle of August, 1911 (Tr. 110).

We do not believe it necessary to extend this already lengthy brief by further trespassing on the time of the Court, on this point.

VII.

Points "VI," pp. 51-56, and "VII," p. 56, of the brief of the learned counsel for plaintiff in

error are fully covered by the evidence and the suggestions made by us in relation to the other portions of the charge which they assert to be erroneous.

The charge was full, fair and based upon the evidence in every instance, and correctly gave the law to the jury.

VIII.

Counsel in their points "VIII," pp. 56-59, "IX," pp. 59-63, and "X," pp. 63-65, of their brief, present contentions that the Court erred in *refusing and modifying* certain instructions requested by them.

The *first two* of these instructions requested by the plaintiff in error *were given*, except portions thereof which stated: "Applying the law as given above," etc., p. 57, p. 59; the *third* requested instruction was *refused*; and there could be no possible error in refusing to give a charge applying the law to a particular state of facts; nor in refusing an instruction containing such an application of the law to a particular state of facts.

The charge of the Court embraces a correct, full and fair statement of the law necessary to enable the jury to apply it to the facts; and no possible injury could or did occur, nor is any pointed out by the learned counsel, to the plaintiff in error from anything in the charge given, nor from anything contained in the parts of the requested instructions refused.

IX.

The learned counsel for plaintiff in error, in their brief, point "XI", pp. 65-68, assert error in the ruling of the Court excluding, on cross-examination, the letter of Williams to Richards, dated June 27, 1911 (Tr. 126-7).

The witness Williams testified that the letter shown him, of June 27, 1911, is in his handwriting and the signature to it was his (Tr. 122).

The defendant in error objected to the letter as irrelevant, incompetent and not cross-examination (Tr. 122).

"MR. PRATT. That whole letter ought to go in. If the Court will read it, it will see that it is not in line with his testimony in some respects; *in others it might be*.

"THE COURT. Anything in it you claim is contradictory, you know how to put the question.

"MR. PRATT. Q. I will ask you if it is not true in that letter of yours to Richards of June 27, 1911, you didn't use this language (reads): 'The Guggenheims are in camp. They have options on most of Flat Creek. We let them have an option for \$33,000. They also take all machinery and wood at cost price and also pay all running expenses if they take it up, which expires August 1st. They are certainly doing some prospecting. They have in their employment 150 men sinking holes which demonstrated they intend giving it a good test. Should they take it up I will come direct to the Springs and make good'.—Did you write that?

"MR. MCGOWAN. We object as irrelevant, incompetent and immaterial, not proper cross-examination, and not in any way impeaching

or contradicting the testimony of this witness.

“THE COURT. What is the purpose of that?

“MR. PRATT. It contradicts him.

“THE COURT. As I understand counsel, this is offered to contradict the witness, and *I do not see that it contradicts him*, and I do not see that it is *proper cross-examination*. The objection will be sustained” (Tr. 123).

The learned counsel do not pretend to point out anything in this question contradicting the witness, and it certainly was not *cross-examination*.

The letter could only be admissible if it contradicted the witness, and then only in case he *denied* writing it, when the fact is he *admitted* writing the letter.

And in any event there is nothing at all in the letter that could possibly help or hurt the case of plaintiff in error, and it was dated June 27, 1911, over *four months after* the date of the note sued on, viz.: February 24, 1911 (Tr. 4-5).

It is unnecessary to further discuss this point.

X.

The last point made by counsel, “XII”, pp. 68-70, of their brief, asserts error in excluding the letter of Richards dated January 2, 1912, *to the bank* (Tr. 208).

Richards testified: That he found out that Williams had signed the note in suit, of February 24,

1911, in a letter from the bank, which he received on December 28, 1911, in San Francisco, to which place it had been forwarded to him, having been addressed to Hot Springs, and that the letter of January 2, 1912, was written and signed by him (Tr. 206).

The *purpose* of offering this letter was stated by counsel to be that

"the minute" (Tr. 207) "he got notice of this note in suit he repudiated it (he received the Bank letter December 28, 1911 (Tr. 206), and this letter is dated January 2, 1912 (Tr. 206), a few days longer than *the minute*) in this letter to the Bank, and I will show by him that he never heard before in his life that there was such a note.

"The COURT. You cannot prove that in that manner" (Tr. 207).

Richards testified at pages 206, 207, during the same testimony, that he left California about March 20, 1912, went through to Fairbanks, was there four or five days, was doing his banking business in the American Bank of Alaska and for nearly a year before; that he there saw Mr. Hurley and had a conversation with him, thus:

"I went in the Bank there, and *told him the same thing as I told him in the letter from San Francisco*—that I didn't see why he could expect me to pay the note; that I had nothing to do with it, and never authorized anybody to sign it, or anything of the sort—Williams, or anybody else. I told him Williams or anybody else; that I never had a partner or anything in the Iditarod, Williams or anybody else" (Tr. 211).

So that, while the *letter* of Richards was excluded, Richards himself was allowed to and did immediately testify that he “went to the bank there, and told him the *same* thing as I told him in the letter from San Francisco” (Tr. 211).

It is impossible to see what possible injury could be sustained by the exclusion of the letter when the writer immediately testified to what he wrote in the letter.

This is a sample of the errors assigned for reversal in this case.

But when the *Court* asked counsel *the purpose* of offering the *letter*, counsel stated:

“The *purpose* of this is to show that *the minute he got notice* of this note in suit *he repudiated* it in this letter to the Bank, and I will show that *he never heard before* in his life that there was *such* a note” (Tr. 207).

Now this letter *does not show* a single one of the things counsel informed the Court was *the purpose* of offering it in evidence. How then could there be error in excluding it; and if there was, Richards immediately testified, not to *that purpose*, but to *its contents* (Tr. 211).

In *Lauderdale County v. Kittel*, 229 Fed. 593, 603, the Court said:

“We think that this answer covered all the plaintiff in error was entitled to, in view of the fact that there was no other information given the Court as to what was *proposed* to be proved by the witness.”

And again, Richards testified: "I had no notification from the bank itself", and he did not notify the bank in any manner, in writing, or by word of mouth, not *until* January 2, 1912 (Tr. 223).

"Q. That was a year and three or four months afterward?

"A. When I got their *first* notification on December 28, 1911, I *immediately wrote back* denying it" (Tr. 223).

Richards testified also:

"Q. Now, when this letter came back from Williams, advising you that he had *deposited* this money in the American Bank of Alaska and had *borrowed on a note signed by yourself and him* the sum of \$3,500, did you notify the Bank that *that proceeding wasn't* considered correct by yourself?

"A. No, *sir, I did not*. I had nothing from the Bank myself" (Tr. 223).

Yet the long letter Williams wrote Richards on October 24, 1910 (Tr. 38-43) told Richards, after stating *the deposit* of the money:

"So I goes to the American Bank of Alaska and *borrow*s \$3,500 for 3 months at one per cent, with the *understanding that it is to be renewed* if it is not convenient to pay *when due 90 days*" (Tr. 40).

Also tells Richards he "had to sign the note Richards & Williams" (Tr. 40).

We will not pursue this point further in order to answer the argument of counsel, although they do say: "We submit the error of the Court in this respect seems *too plain for argument* and the same

was *vital* to the defendant Richards," etc. (Brief, p. 69).

Counsel state so positively: "There is *nowhere* in the record *any evidence* that Richards ever had any knowledge of this note of February 24, 1911, until", etc.; and, "There is *no contradiction* of this fact" (Brief, p. 69), that we seem to be constantly quoting the above paragraph from William's letter of October 24, 1911, as to the money being *borrowed* "with the understanding that it is *to be renewed*" in 90 days, and that he signed the *note* in the name of "Richards & Williams" (Tr. 40).

How, in the presence of this plainly stated fact and notice to Richards in William's long letter of details, which letter Richards admits he received and answered in his own long letter of December 8, 1910 (Tr. 44-47), how, can these statements be made?

In conclusion, and with our apology to the Court for the burden imposed upon the Court of reading this long brief which we felt our duty required us to present in replying to the assertions by the learned counsel for plaintiff in error of errors committed on the trial, we respectfully submit:

First. That the *motion to dismiss* the writ of error should be granted.

Second. That upon the merits, the trial was without any error tending in any possible way to

prejudice or injure the plaintiff in error, and that the *judgment* should be affirmed.

Dated, San Francisco,

April 19, 1916.

CHARLES J. HEGGERTY,

THOMAS A. MCGOWAN,

JOHN A. CLARK,

Attorneys for Defendant in Error.

KNIGHT & HEGGERTY,

MCGOWAN & CLARK,

Of Counsel.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

EDWIN RICHARDS,
Plaintiff in Error,

vs.

AMERICAN BANK OF ALASKA, a
corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN RESPONSE TO
BRIEF OF DEFENDANT IN ERROR ON
MOTION TO DISMISS.

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The James H. Barry Co.,
San Francisco

Filed

MAY 5 - 1916

F. D. Monckton,



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MOTION TO DISMISS.

This Court has said in reference to motions of a similar nature to the one at bar that "the rule must be determined by the particular facts in each case as they arise." In order therefore that the Court may be fully advised as to the facts underlying the motion to dismiss and before a determination thereof, we ask that the entire record be considered by the Court. In this regard we beg to call attention to the complaint, which is as follows (Tr., 3-7):

I.

That plaintiff above named is a corporation,
duly and regularly organized and existing under

and by virtue of the laws of the State of Washington, and having a place of business and a duly authorized resident agent within the Fourth Judicial Division of the Territory of Alaska.

2.

That at all the times hereinafter mentioned Edward Williams and Edwin Richards *were a mining co-partnership*, engaged in business in the Iditarod district of the Territory of Alaska, under the firm name and style of Richards & Williams.

3.

That on or about the month of September, A. D. One thousand nine hundred ten, plaintiff above named, at the special instance and request of defendants above named, loaned to defendants a sum in excess of thirty-five hundred dollars (\$3500.00), which said sum defendants promised and agreed to repay to plaintiff, and thereafter and on or about the twenty-fourth day of February, A. D. One thousand nine hundred eleven, said defendants, in consideration of the moneys theretofore loaned to them by plaintiff herein, made, executed and delivered to plaintiff herein their certain promissory note, in the words and figures following, to wit:

Iditarod, Alaska, Feb. 24, 1911.

\$3500.00.

On or before July 11, 1911, after date, *I* promise to pay to the order of American Bank of Alaska, at its office in Iditarod, Alaska, Thirty-five hundred 00-100 Dollars for value received, with interest after date at the rate of Twelve per cent. per annum until paid. Principal and inter-

est payable only in U. S. Gold Coin of the present standard of weight and fineness. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety, and promises, in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the court may adjudge reasonable as attorney's fees in such suit.

(Sgd.) RICHARDS & WILLIAMS,
By EDWARD WILLIAMS.

(Sgd.) EDWARD WILLIAMS.

(Sgd.) EDWIN RICHARDS.
By EDWARD WILLIAMS,
His Attorney in Fact.

4.

That said note is past due and no part thereof has been paid, and the whole thereof, both principal and interest, is now due, owing and unpaid from defendants to plaintiff herein.

5.

That plaintiff has been compelled to, and has, employed attorneys to institute and prosecute this action for said sum, and has become liable to said attorneys for reasonable attorneys' fees, and plaintiff is informed and believes and so alleges that the sum of seven hundred fifty dollars (\$750.00) would be a reasonable sum to be allowed to its attorneys for their services in said action.

For a second and further separate cause of action against defendant and in favor of plaintiff, plaintiff alleges as follows, to wit:

1.

That plaintiff above named is a corporation, duly and regularly organized and existing under and by virtue of the laws of the State of Washington, and having a place of business and a duly authorized resident agent within the Fourth Judicial Division of the Territory of Alaska.

2.

That at all the times hereinafter mentioned, Edward Williams and Edwin Richards *were a mining copartnership*, engaged in business in the Iditarod District of the Territory of Alaska, under the firm name and style of Richards & Williams.

3.

That on and prior to the sixteenth day of September A. D. One thousand nine hundred eleven, and within one year prior thereto, plaintiff above named, at the special instance and request of defendants herein, permitted said defendants to overdraw their account at the bank conducted by plaintiff in Iditarod, Alaska, in the sum of three hundred twenty-seven and 96/100 Dollars (\$327.96), which said sum defendants promised and agreed to repay to plaintiff on demand.

4.

That plaintiff has demanded the payment of said sum, but to pay the same defendants have failed and neglected and do now fail and neglect.

That there is now due, owing and unpaid from defendants to plaintiff the said sum of three hundred twenty-seven and 96/100 dollars (\$327.96), together with interest thereon at the rate of eight per centum per annum from the sixteenth day of September, A. D. One thousand nine hundred eleven, to date.

Wherefore, plaintiff prays judgment against defendants above named, and each of them, and against the copartnership of Richards & Williams, as follows, to wit:

1.

On its first cause of action, for the sum of thirty-five hundred dollars (\$3500.00), together with interest thereon at the rate of twelve per centum per annum from the twenty-eighth of February, A. D. One thousand nine hundred eleven, to date, together with an attorneys' fee in the sum of seven hundred fifty dollars (\$750.00).

2.

On its second cause of action, for the sum of three hundred twenty-seven and 96/100 dollars (\$327.96), together with interest thereon at the rate of eight per centum per annum from the sixteenth day of September, A. D. One thousand nine hundred eleven, to date.

3.

For costs of suit and for such other and further relief as to the court shall appear meet, just and equitable in the premises.

The second cause of action was at the trial dismissed (Tr., 12).

To this complaint the plaintiff in error alone answered denying all of the allegations save the corporate existence of the Bank (Tr., 8-9).

The defendant Willams *never made any appearance or answer*. The case was tried three times and not until about the close of the third trial was his *default* entered by the Bank (Tr., 17-244). See also copy of certificate of Clerk of District Court, Territory of Alaska, for the Fourth Division, hereto attached (Marked Exhibit "A"), original of which has been filed in the office of the Clerk of the Circuit Court of Appeals, showing the conditions with reference to the failure of Williams to take any action.

The defendant Williams came voluntarily nearly one thousand miles (Tr., 135) to testify against his co-defendant Richards and was the principal witness for the plaintiff Bank.

At the risk of trespassing upon the patience of the Court, and notwithstanding the criticism of counsel of our statement of facts in opening, we reiterate that the following facts were developed at the trial and a careful reading of the transcript will disclose the same, to wit:

Edward Richards had mined on quite a large scale on Dome Creek near Fairbanks for several years, and in 1908 went into the Hot Springs District and commenced mining operations with a large plant and

machinery on Cache Creek, where he had an interest in some twenty claims (Tr., 192), and was still working them at time of trial. He was a man of good financial reputation and his standing was excellent with the banks (Tr., 163, 171). Prior to going down from Dome Creek, Williams, whom Richards had known in Dawson, had been employed by him on Dome Creek for a year or more (Tr., 60, 192). He was a sort of general hanger on around Richards, doing the cooking when Richards had men enough without his mining and mining otherwise. When Richards went to the Hot Springs, Williams followed him down and worked for him, chiefly at cooking, during the summer of 1909 (Tr., 22, 61, 191-2). At this time Richards was working a lay over on Cache Creek, but going out in the fall, turned the lay over to Williams and a man by the name of Johanson, together with the plant, the stuff in the mess house, etc., and left them some little credit at the store. The result of this lay was disastrous, as when they quit in August, 1910, they owed Richards six or seven hundred dollars, which was a dead loss to the latter (Tr., 62-3, 192). In the spring of 1910, Richards returned to Cache Creek but was hurt and spent a good part of the summer at the hospital and at Gibbon, but when he got back to Cache Creek he lived at the same mess house as Johanson and Williams, and had a cabin close by. There was a phone theretofore paid for by Williams and Johanson, but when Richards

came he used it and paid his share of it, but there was no partnership of any kind claimed between them (Tr., 63, 193). In the spring of 1910 Williams was in correspondence with a man by the name of Boulton, who owned a half interest in a lease on Flat Creek, in the Iditarod country, a distance of about 1100 miles from the Hot Springs country. Williams and Boulton had been old-time friends and partners in Dawson (Tr., 60, 61). Boulton represented to Williams that he had a lay and was having trouble with his partners and wanted Williams to come down and buy a quarter interest in it. Boulton knew that Richards had money and Williams admits that he may have told Boulton that. In any event, Williams spoke to Richards about this lease when Richards returned to Cache Creek in 1910 and they had some talk of no particular importance about it. Later, in September, 1910, a telegram came from Boulton, addressed to Richards at Hot Springs, to "send \$2000 at once through N. C. fifty thousand at stake. Freeze out game, don't fail to see letter" (Tr., 69, 196). It was phoned to Richards at Cache Creek. Richards showed the telegram to Williams with the statement that he didn't think it was meant for him and that it must have been for Williams. This letter referred to was afterwards received by Williams, being addressed to him, and was forwarded to the Iditarod (Tr., 70). But they discussed the matter and Richards said he could not go down or send any money down, and

didn't want anything to do with it, but being desirous that Williams should have a chance, asked Williams if he would like to go, who responded "what was the use of talking, he had no money" (Tr., 71, 197). To which Richards replied, "Well, if you think you could do yourself any good by going down there I would give you the money to go down." Williams was only too glad of the opportunity. In a day or two Richards and he went to Hot Springs and Richards gave Williams some \$2500, a \$2300 check and \$200 in currency (Tr., 73, 200).

Williams testified that he then went immediately to the Iditarod; that he had no understanding whatever with Richards that he was to go down there and buy the quarter interest from Boulton and take an assignment in the name of himself and Richards; that he had no verbal or written contract with Richards that he would go down there, buy into that lease on Flat Creek for the benefit of himself and Richards, or that they would mine there as mining co-partners that summer. There was nothing said about a co-partnership or a co-partnership name or that he was to put the money Richards gave him in the name of a partnership of Richards and Williams or about dividing profits and losses, but he was to go down there and use his judgment about buying. In fact, he testified that he expressed his appreciation to Richards in giving him the money to go, saying that he would

do the right thing in return, and went (Tr., 78-9-80-81).

Richards charged Williams up in his private books in a personal account standing in Williams' name for the \$2500.00 advanced, and for the moneys paid for the boatman who took Williams to Gibbon on the way to the Iditarod. This was outside of the account standing on Richards' books in the name of Williams and Johanson regarding the money they owed him on the lay which had proved a failure (Tr., 228).

Notwithstanding this, Williams went to the Iditarod and first deposited the money with the Miners & Merchants Bank in his own name (Tr., 81-85). He met Boulton, found he was having trouble with his then partners, Shively and Kennedy, who owned half of the lay, and he bought half of Boulton's interest, or a quarter of the whole lay, at \$2000. Boulton wanted him to buy out the other two and he decided to do so (after going out and looking over the ground) at a cost of \$4500. It then became necessary to raise the extra money. He could not get it at the Miners & Merchants Bank where he had deposited the \$2300 in his own name. Nor did he offer there to get the money on a paper signed Richards & Williams (Tr., 87). But he went to a man by the name of Morgan who knew Richards, told him what he wanted; that he had no power of attorney from Richards but he would like to make a loan and *considered* Richards his partner. Then Morgan introduced him

to Hurley, president of the plaintiff, and he told Hurley the same thing.

Hurley knew Richards by sight, and knew he was a man of means, employed people and responded to all his obligations, although he had never heard or known of Williams when he came to the Bank, and testified he would not lend him any money (Tr., 71-5). But upon Williams' statement that Richards was his partner (and without wiring or writing Richards, or making any inquiries to establish the fact) he loaned Williams \$3500, which was placed to his credit under the name of Richards & Williams. Prior to this, Williams had taken the money Richards had loaned him, from the Miners & Merchants Bank, and deposited it with the plaintiff under the partnership name of Richards & Williams. This at Hurley's suggestion (Tr., 32). A note was made payable in ninety days, dated October 6, 1910, signed "*Richards & Williams by Ed. Williams*" (Tr., 34). The Bank never notified Richards of the making of this note in any way. Hurley advised Williams to notify Richards, which the latter did, fairly describing the transaction (Tr., 39), which letter Richards received on December 7th, to which he replied in effect, denying Williams' right to sign his name to the note and more or less upbraiding him for doing so (Tr., 44). Later, Richards wrote a letter dated December 16th, severely criticizing the action of Williams in signing his name to the note, one sentence in which was to

the effect that he (Richards) "would not be responsible for any note, check or any other written instrument to which Williams might have signed or "should sign his name to in the Iditarod Country." This letter was proven by the defense to have been destroyed by Williams, but the contents were shown beyond all question by Richards (Tr., 204), and admitted by Williams (Tr., 96, 97, 115, 116, 117). Richards wrote another letter couched in milder language on December 26th, 1910, but along the same general lines (Tr., 51). Williams received these letters in the Iditarod in the latter part of January, 1911 (Tr., 99), and informed Hurley of at least a portion of their contents. From the time that the note of October 6, 1910, became due and payable in January, 1911, Hurley was constantly pressing payment up to the making of the note of February 24, 1911, sued on in this action. Williams had informed Hurley that Richards did not want to stay in the transaction and that he would have to get other partners (Tr., 101), and Hurley was aware that he was negotiating and did finally make a sale of a half interest to two men by the name of McKenzie and McLellan (Tr., 124), retaining a quarter interest.

On February 24, 1911, Hurley insisted on the giving of the new note which was introduced in evidence and was signed differently than as pleaded, being signed personally by Williams, who then signed Richard's name by himself as attorney and then as an after-

thought "By Edward Williams, Richards & Williams" (Tr., 56). In this respect we call the Court's attention to the note of October 6, 1910 (Tr., 34-5), where the signature is "Richards & Williams per Ed. Williams." Hurley also required the making of a mortgage on the three-quarter interest in the lease. He had Williams send a blank bill of sale to Richards, by which the latter conveyed to Williams all his interest, if any, in the lay, with the understanding on the part of Hurley and Williams that if a new note was executed and a mortgage covering the three-quarter's interest in the lay, that when the bill of sale came back from Richards, Richards should be released from all responsibility (Tr., 102-3-4). The new note, and mortgage to secure it, were made as between Edward Williams and Edwin Richards *individually*, as parties of the first part, and American Bank of Alaska, as the second party (Tr., 105). It was distinctly understood by Hurley at the time of the making of this new note and a mortgage to secure it, that Williams had no power of attorney or any written authority to act for Richards or sign his name and discussion was had relative to the fact (Tr., 180). Counsel was taken with attorneys and it was finally decided that Williams should sign his name and Richards' name by himself as attorney in fact, notwithstanding that Williams had no power of attorney, Hurley remarking that it wasn't business, but he would take a chance on it (Tr., 88-89; 180-181). The note

and mortgage were then executed in that form (Tr., 31, 88-89, 166-7, 180-181).

When Williams purchased the interest of Shively and Kennedy at the time of obtaining the \$3500 on the first note, he took the assignment of the interest in the name of Williams & Richards, but making a note to Kennedy for a part of his payment (some eight hundred dollars), he signed his own, not Richards' name (Tr., 91-2). There were some moneys owing by Kennedy and Shively, and Williams paid a part of the purchase price in checks to various people, and he did not sign Richards' name or any partnership name to these checks, but signed his own. He bought a boiler for \$2100 to be used in working the lay, paying \$700 cash to one Tom Aitkin, and gave a note in his own name to Aitkin for the balance. In fact, never signed any notes in the name of Richards or of the alleged partnership, other than the original note of October 6th, and the note of February 24th in suit (Tr., 92-3), which it appears was done solely on the suggestion of Hurley. The evidence shows both from the testimony of Williams and his correspondence with Richards that he was very apprehensive about the result of his making these notes in Richards' name and his lack of authority to do so. As he testified, he felt that he had placed himself in a very delicate position (Tr., 118-131). The Bank never notified Richards at all of the making of the first note, although Hurley testified that it was entirely "on the

strength of the statement made by Williams that Richards was his partner and upon the strength of Richards' name" that the money was loaned (Tr., 173-189). And Richards never knew or heard that the assignment of the three-quarter interest in the lease was taken in his name, together with that of Richards, until May, 1911, when he received the blank quit-claim deed to execute, reconveying to Williams, with a request that he sign it and send it back, which he did (Tr., 228). This was the letter of April 4, 1911 (Defendant's Exhibit 2) (Tr., 124), wherein he was told that if he would sign and send this bill of sale back, conveying to Williams, he would be released of all obligations, and in which letter Williams said, "*If you want some security for the money you gave me I can give you the quarter interest which I still hold*" (Tr., 125).

During the summer of 1911, mining operations were carried on on quite an extensive scale on the lay on Flat Creek by a co-partnership composed of Williams, Boulton, McLennon and McKenzie, and there was no claim whatever from anybody that Richards had any more to do with these operations than had the Czar of Russia or the Kaiser Wilhelm. During the summer of 1911, the plaintiff collected large sums of money from that outfit (Tr., 184-187). The clean-ups were pretty good until August and the firm had deposited gold dust to meet their checks at the Bank to the extent of possibly fifty thousand dollars, and

when the mine closed down, there was an overdraft of some three hundred odd dollars (Tr., 186-187), the amount of the second cause of action dismissed (on second thought by the Bank), as the evidence conclusively showed that Richards never had anything to do with these mining operations at Flat Creek or at any other point in the Iditarod District.

So far as the note of February 24, 1911, is concerned, Richards never heard of this note until he received a letter which was written by the Bank some time in October and received by him on December 28, 1911, at San Francisco. This letter was ruled out as well as the reply of Richards thereto, written four days later and dated January 2, 1912, in which he expressed his surprise and repudiated the note in unmistakable terms (Tr., 206-208). Later, in the year 1912, he was in Fairbanks and went to the Bank and again repudiated the note (Tr., 211). This Hurley also admits (Tr., 245).

Upon this evidence the jury rendered a verdict for the Bank in the full face of the note against Edwin Richards and Edward Williams as Richards & Williams, a copartnership, *and the defendant Richards*, and with no interest but with attorneys' fees (Tr., 15). Upon which verdict the Court rendered the following judgment:

" . . . It is ordered, adjudged and decreed:

1. That the plaintiff have and recover from

Edwin Richards and Edward Williams, copartners as Richards & Williams, and from the defendant Edwin Richards, *as an individual*, the sum of Thirty-five hundred dollars (\$3500.00), together with an attorney's fee in the sum of seven hundred and fifty dollars (\$750.00) ;

2. That plaintiff have and recover from the defendant Edward Williams, *as an individual*, the sum of thirty-five hundred dollars (\$3500.00), *together with interest thereon from February 24, 1911, to date, at the rate of twelve per cent. (12%) per annum, amounting to the sum of Thirteen hundred twelve, and 50/100 Dollars*, and an attorney's fee in the sum of Seven hundred and fifty dollars (\$750.00) ;

3. That the plaintiff have and recover from the defendants, Edward Williams and Edwin Richards, copartners as Richards & Williams, and Edwin Richards, and Edward Williams, as individuals, the costs of this suit, to be taxed by the clerk; and

4. That the attachment lien of plaintiff on property of the defendant Richards be foreclosed and the property so attached sold by the United States Marshal in the manner prescribed by law, and the net proceeds thereof, or as much thereof as may be necessary, applied by said United States Marshal as a payment upon the judgment above rendered."

In short we have a judgment against the alleged partnership, Richards & Williams, and Richards individually and a separate judgment against Williams individually, the judgment against the latter differing

materially in amount from that against the former.

In addition there is a judgment that the attachment theretofore placed on the individual property of Richards be sold and proceeds applied to the payment of the judgment.

As a matter of fact, certain of the property belonging to Richards, so attached, was thereafter sold upon execution as shown by a certified copy of the execution and return of the United States Marshal filed with the Clerk of this Court, marked "Plaintiff in Error's Exhibit B," on the motion to dismiss.

In due course the writ of error was allowed to Richards, citation issued, transcript printed and case set down for hearing for the October term, 1914; was continued until the May calendar, 1915, but before the hearing and *just* fifteen days *after* the year allowed for the taking of an appeal had expired (and within which if the motion were well taken, the plaintiff in error might have remedied his appeal) the motion to dismiss was filed, no readiness having been shown on behalf of defendant in error to meet the case on the merits by the filing of a brief.

To realize the attitude shown by the non-appearing defendant Williams on the trial it is necessary that the Court read the record before passing on the motion to dismiss. To have asked Williams to join in this appeal would have been futile and the law does not require a useless act. Showing how futile it would be, since the filing of the motion, said Williams made

and caused to be filed with the clerk of the Circuit Court of Appeals, marked "Plaintiff in Error's Exhibit C" on the motion to dismiss, the following statement:

In the United States Circuit Court of Appeals, for the Ninth Circuit.

Edwin Richards, Plaintiff in error, vs. The American Bank of Alaska, a corporation, Defendant in error.
—No. 2440.

STATEMENT AND DECLARATION BY DEFENDANT, EDWARD WILLIAMS.

I hereby certify and declare that I was one of the defendants in an action at law lately pending in the District Court for the Territory of Alaska, Fourth Judicial Division, sitting at Fairbanks, which said action was numbered 1815 on the records of the said court, and was entitled as follows: The American Bank of Alaska, a corporation, Plaintiff, vs. Edward Williams and Edwin Richards, mining co-partners engaged in business under the firm name and style of Richards and Williams, and Richards and Williams, a mining co-partnership, Defendants." That said action was tried three times in the said court and passed into a judgment on the 20th day of April, 1914, the said judgment being against Richards and Williams, as co-partners, and included also a separate judgment against defendant Edwin Richards, for the

sum of \$250.00, and the costs of the case, and a judgment against myself for \$5562.50, and all the costs of the case to be taxed by the clerk; that in said action an attachment was issued at the commencement thereof and was levied on the real and personal property belonging to the defendant Edwin Richards, which said attachment lien was foreclosed in and by said judgment, and the said attached property ordered sold;

That in the said action No. 1815, I had no attorney at any of the three trials thereof in the said District Court, but made default, and at each of the said three trials went upon the stand and was the principal and material witness on behalf of the plaintiff Bank on all of the issues of the said case as made by the plaintiff's complaint and the separate answer of the defendant, Edwin Richards; that at the trial of the said cause, and especially at the last trial thereof, *I made no effort to prepare the record for review so far as I was connected therewith, and in that manner waived and released any and all errors that the court may have committed as against myself, if any were committed, and I do now and here waive and release any and all errors that may have been committed by the court during the progress of the last trial, or of any of the trials of the said cause as against myself; that had the defendant, Edwin Richards, notified me of his purpose and intention to prosecute a writ of error in the said Court of Appeals from the said judgment with a request that I join him therein, I*

would have refused to have so joined, and have never at any time had any wish or desire either to join the said Richards in his writ of error or to prosecute one separately on my own behalf; that I respectfully ask the United States Court of Appeals, for the Ninth Circuit, to pass upon the merits of the said writ of error, without any reference to any supposed rights I may have ever had in connection with the said action, No. 1815, and the records and proceedings therein.

Dated at Taft, Alaska, June 9, 1915.

EDWARD WILLIAMS. (*Italics ours.*)

Witnesses to signature:

GEO. A. COLBURN.

ALEXANDER FOWLER.

United States of America,
Territory of Alaska—ss.

Be it remembered that on this 9th day of June, 1915, before me the undersigned, personally appeared Edward Williams, known to me to be the identical person who signed the foregoing statement and declaration, and acknowledged to me that his signature thereto was his genuine signature and that he signed the same voluntarily for the uses and purposes therein set forth and indicated.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 9th day of June, 1915.

C. P. SNYDER,
Notary Public in and for the Territory of Alaska.

Note:—The \$5562.50 referred to in said statement is the amount of the note, interest and attorney's fees.

ARGUMENT.

On the oral argument we advanced as one of the reasons why the appeal should not be dismissed the fact that the defendant Williams had constructive notice by reason of the allowance in open Court of the writ of error.

The judgment was rendered in open Court on the 20th of April (Tr., 19-20). The day after, April 21st, the petition for the writ and assignments of error were filed (Tr., 273-289) and an order was made *in open Court* on the same day allowing the writ of error and entered in the *Journal of the Court's proceedings on that day* (Tr., 289-290). Bond filed and writ of error and citation issued on May 2, 1914, returnable June 1, 1914 (Tr., 20-294), an order made in open Court and entered in the *Journal of the Court's proceedings* as of that day enlarging the return day to August 1, 1914 (Tr., 295-6), all at the same term of Court.

The appeal was finally perfected by the filing of the transcript of record in this Court on June 30,

1914, which completed the jurisdiction of this Court over the subject-matter of the appeal.

We submit that did the same rule prevail in law actions as in equity, that Williams would be bound by the rule of constructive notice of the proceedings at the time of the allowance of the writ of error, and no citation would be necessary, as a citation is simply intended as notice that an appeal has been taken and will be duly prosecuted.

Dodge v. Knowles, 114 U. S., 436, 439, Vol. 29 L. Ed., 296;

Chicago & P. R. R. Co. v. Blair, 100 U. S., 585, Vol. 25, 287;

Brown v. McConnell, 124 U. S., 489; 31 L. Ed., 444;

Foster's Federal Practice, Vol. III, Sec. 505, p. 2056;

King v. Thompson, 116 Fed., 319 (C. C. A.);

Swift & Co. v. Kortrecht, 110 Fed., 328 (C. C. A.);

Jos. H. Rice Co. v. Libbey, 105 Fed., 825 (C. C. A.);

Kidder v. Fidelity Ins. Trust & S. D. Co., 105 Fed., 821;

McNulta v. West Chicago Commrs. 99 Fed., 328 (C. C. A.);

Taylor v. Leesnitzer, 220 U. S., 89-90, 55 L. Ed., 382.

We cite these cases in explanation of our reasons

for urging upon the oral argument a point which we must now reluctantly cease to urge if the case of *United States v. Philips*, cited by counsel for defendant in error, is, as we assume, decisive of the question that there can be no constructive notice of appeal in law cases to defendants in error.

We contend, however, that there is no merit in the motion to dismiss for the reasons:

1st: That the judgment is not joint, but several;

2nd: The defendant Williams has waived all right to sue out a writ of error and the time has expired within which any such writ could be sued out.

Therefore, the reason for the exercise of the rule prayed for in the motion to dismiss does not exist and its exercise would work an unwarranted hardship on the plaintiff in error.

First. The rule which requires the parties to a joint judgment, or decree, to join in an appeal therefrom, or to be severed by some proper proceeding, is well settled. We do not dispute this principle of procedure but the rule is only applicable to joint judgments and where the interest of one of the defendants is separate from his co-defendants, he may appeal or sue out his writ of error without joining or severing the latter.

Winters v. U. S., 207 U. S., 574; 52 L. Ed., 340;

Todd v. Daniel, 16 Pet., 521; 10 L. Ed., 1054;
Henrick v. Patrick, 119 U. S., 156; 30 L. Ed.,
 396;
Forgay v. Conrad, 6 How., 201;
Brewster v. Wakefield (U. S.), 16 L. Ed., 301;
City Nat'l Bk. etc. v. Hunter, 129 U. S., 537;
 32 L. Ed., 753;
Germain v. Mason, 12 Wall., 259-261; 20 L.
 Ed., 392.

In the case last cited it was held, quoting the syllabus:

“A defendant who has a separate, distinct, personal judgment against him for *money*, in which the other defendants have no interest, has a right to prosecute a writ of error in his own name without joining them.”

This latter condition we claim exists in this case. An examination of the judgment shows that it is distributive in its character.

There is a judgment against Richards and Williams described as partners and Richards individually in a specified sum to wit: \$3500 and \$750, attorneys' fees; a judgment against Williams as an individual in an entirely different amount comprising the full amount of the note with interest and an attorneys' fee, without any reference to the fact that there is also a distinct provision in the judgment that the attachment lien on Richards' property shall be foreclosed, and a judgment for costs against both Rich-

ards and Williams described as co-partners and also individually for costs (which latter provision for the purposes of this motion is immaterial). *Higbee v. Chadwick*, 220 Fed., 873.

The contract sued upon on its face is joint and several.

This being so, why the needless efforts of counsel to urge upon the Court that under Section 325 of the Code of Alaska (presumably Carter's Code, now Section 754 of the Compiled Laws of Alaska of 1913), the members of a limited partnership are jointly and severally liable for its debts?

The language of the note is "I promise to pay," followed by the individual signatures of Williams, Richards (by Williams) and the partnership name by Williams. Where such is the case the rule is elementary that the promise is joint and several. That is, joint because all unite in one promise and each severally undertakes, and the facts in this record show the note was intended to be the personal note of the parties. The first note given to the Bank by Williams was signed by the alleged firm name only. And the judgment prayed for is against "each of the defendants and against the co-partnership, Richards and Williams."

Counsel besides overlooking this very obvious proposition of law in their efforts to show a joint and several liability are apt to mislead the Court by a failure to call its attention further to the fact that "limited partnerships" under both Carter's Code and the Com-

piled Laws of Alaska of 1913 (Secs. 723 *et seq.*), are those formed for the transaction of "mercantile, mechanical or manufacturing business" and do not include a *mining* partnership as pleaded in this case; besides requiring the filing of a formal certificate of partnership, etc. Therefore Section 325 of Carter's Code can have no bearing whatever on this point.

The conditions here are unlike those in an action upon a contract against a partnership or its members where the partnership is a recognized and admitted fact. Here the question of the partnership is one of the main contested issues.

Williams by his default, admitted all of the material allegations of the complaint, including the making of the note and his individual liability, which certainly entitled the plaintiff to a separate judgment against him in the full amount claimed and obtained, as distinct from the judgment against Richards, based upon the verdict which allowed no interest.

Section 866 of the Code of Civil Procedure of Alaska (Compiled Laws of Alaska of 1913) provides that

"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff."

And Section 883 of the same Code contains a provision similar in its substance to Section 578 of the

Code of Civil Procedure of the State of California cited in the case of *Bailey Loan Co. v. Hall*, 110 Cal., p. 490, hereinafter referred to, to wit:

“ . . . Third—If all the defendants have been served, judgment may be taken against any or either of them *severally* when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.”

And Section 1067 provides that

“Judgment may be given for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves,”

While Section 1068 says that

“In an action against several defendants, the Court may in its discretion render judgment against one or more of them whenever a several judgment is proper, leaving the action to proceed against the others.”

Counsel endeavor to make a distinction between the word several and separate but we fail to see wherein any difference in the two words can be drawn when used in this connection.

“Several . . . (3) Pertaining to an individual only; not common to two or more; *separate*; as, their several wishes shall be met. *Law*. Individually and separately related; separable; as a joint and several note. . . . (6) Separated; apart from others. . . .”

(*New Standard Dictionary*.)

While it is true that the judgment against Richards is also against the partnership, yet Richards as a member of the partnership would be severally liable for its indebtedness (conceding that he was a partner and *that the indebtedness was such as might have been entered into by Williams on behalf of the partnership*) as well as severally liable under the language of the note itself. The liability of the partnership under the note is several; that of Williams is also several. All their liabilities are at the same time joint. Therefore that portion of the judgment referring to the members of the partnership and to Richards cannot be held to be other than an expression of the individual liability of the partnership and the individual liability of Richards to pay the \$3500 judgment and attorneys' fees in accordance with the prayer of the complaint. There is in addition the individual liability of Williams as set forth in a subsequent paragraph of the judgment based upon his admissions by defaulting. Otherwise we would have a judgment for joint liability as between the partnership (ostensibly composed of Richards and Williams) and Richards to pay this \$3500 judgment and attorneys' fees, which would mean a three-quarter liability for Richards instead of a full liability for the whole, reading that provision of the judgment as we do, and also reading the provisions of the judgment in the light of the note and the legal conclusions arising out of the form of said note sued upon and the prayer of the complaint, to wit: "plaintiff prays judgment

“against defendants above named and *each* of them
 “and against the copartnership of Richards and Wil-
 “liams” (Tr., 7).

Bailey Loan Co. v. Hall, 110 Cal., 490.

In the case of *Sears v. McGrew*, 10 Oregon, construing statutes of the Oregon Code similar to those quoted above, the Supreme Court of Oregon say:

“The complaint in this case as was said in *Decker v. Trelling, et al.*, 24 Wis., 613, sufficiently states the facts out of which the liability of the defendants arise, and although it was in form adapted to a recovery against all the makers of the note jointly, it was still so framed that a several judgment could properly be had upon it against one or more of them. It alleged that the defendants made their joint and several note in writing, which note was set out in *haec verba* and attended with suitable averments to show that the plaintiff was entitled to judgment. Now under the Sections above referred to, judgment may be entered against any one or more of several defendants, whenever a several action might have been brought or a several judgment upon the facts of the case would be proper and this is allowable irrespective of the character of the complaint, whether it alleges a joint or several liability. The true criterion being whether a separate action might have been maintained, and if it could a several and separate judgment is proper. . . . But if the action is upon a contract joint and several, a several judgment would be proper as the defendant might have been sued alone; therefore judgment might be rendered against one or more without waiting the final trial (*Hempy v. Ramson*, 33 Oh. St., 313 . . .).

"In *Hempy v. Ramson*, *supra*, the result reached by the Court was:

"(1) That in an action against two or more defendants where it appears that a several judgment is proper, it may in the discretion of the Court, be taken against one or more, leaving the action to proceed as to the others. (2) That such separate judgment against one or more operates as a severance of the cause of action and after such judgment the issues made by the remaining defendants are to be heard and determined as if they had been sued alone. (3) On such final trial a judgment may be rendered against the remaining defendants for the whole or such part of, the cause of action as may be proved against him.' . . .

"The doctrine of merger and of the release of one of the makers of a note by taking judgment against the other, has no application to cases of this character under our Statute."

In the case of *Randall v. Hunter*, 69 Cal., 80, the Supreme Court of California was considering the question of who was an "adverse party" within the meaning of a section of the California Code of Civil Procedure requiring adverse parties to be served with a notice of appeal. The facts of the case are curiously like those of the case at bar in many respects, and we think serve to emphasize the fact of the separate or several judgment in this case.

In that case the plaintiff sued one Hunter and one Gill as partners on a promissory note signed "Gill & Hunter." Gill defaulted. Hunter set up an individual defense, alleging among other things execution of the note without his knowledge or consent, and

that it was not executed for the use and benefit of the firm.

A judgment was entered against both Gill on his default and Hunter on the verdict against him. Hunter alone took the appeal and did not notice Gill. Motion made to dismiss for failure to serve Gill as an adverse party.

The Court in denying the motion said, referring to Gill:

“ . . . the judgment appealed from was rendered against him by default. If the judgment as to Hunter is reversed, it would still stand unreversed as to Gill and therefore he would not be affected by a reversal. If the judgment is affirmed, the judgment appealed from would remain unchanged and manifestly Gill's interest would not be affected by the judgment of affirmance. Whatever modification might be made of the judgment rendered by the Court below, or whatever judgment might be here rendered, *the judgment by default would still remain against Gill.*

“It is said that if the judgment is reversed another trial might result in a several judgment against Gill, whereas the judgment against him is now a joint judgment one against him and Hunter, and that he is interested in preserving the joint judgment against him and preventing a several judgment as to him. *But his default admits that he is bound severally as well as jointly. If on the trial which has taken place a verdict had passed in Hunter's favor, a judgment by default might have been entered against him (Gill) severally. A reversal of the judgment appealed from would not do away with this default. It would only affect the judgment as to Hunter. As long as the default stands whatever judgment is ren-*

dered here would not affect the judgment against Gill. In this view we do not think Gill was an adverse party upon whom notice of appeal should have been served."

See also the case of *Bailey Loan Co. v. Hall*, 110 Cal., 490, hereinbefore referred to.

The action there was brought upon certain promissory notes purporting to have been made to the plaintiff by "H. G. Hall & Sons," against the three defendants alleged to have constituted the partnership. Two defendants defaulted. The third answered denying that he was a member of the partnership at the time of the execution of the notes. Upon the trial judgment was rendered in favor of the plaintiff against the defaulting defendants and in favor of the defendant who answered the complaint. The defendants against whom the judgment was rendered appealed upon the ground that as the action was against three defendants on a partnership obligation, the Court was not authorized to enter a judgment by default against two only.

The Court cited the provision of the California Code of Civil Procedure (Section 578), similar to the Alaska statute, to the effect that "judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants," saying:

"The terms of this section do not limit the rule to actions in which the defendants have appeared and answered, but include as well those in which

some of the defendants have made default, the only limitation in such case being that found in Section 580 that the relief shall not exceed that which the plaintiff shall have demanded in the complaint."

Citing approvingly *Randall v. Hunter, supra*, then say further:

"The appellants herein having made default to the plaintiff's complaint thereby admitted the truth of the allegations and consented to a judgment giving to the plaintiff all the relief he had prayed for. They admitted that they were members of the partnership of 'H. G. Hall & Co.' and that the notes set out in the complaint had been executed to the plaintiff by that partnership. *These facts whether admitted by their default, or established by evidence at the trial, entitled the plaintiff to a judgment against them. It is immaterial to them that their co-defendant was able to show at the trial that he was not a member of the partnership, and thus to defeat the plaintiff's right of recovery. It was not necessary that the judgment should run against the appellants as co-partners. The notes upon which the action is brought are several as well as joint, and the prayer of the complaint is for a judgment 'against said defendants' for the amount of said notes. The court was thus authorized to enter a several judgment against the appellants and the judgment entered is in accordance with the prayer of the complaint.*"

In conclusion upon this point we cite the case of

Winters v. United States, 207 U. S., 565-8,
52 L. Ed., 340.

That was a suit brought by the United States against

the appellants in the case and others to restrain them from conducting or maintaining dams on Milk River or preventing the waters of the river from flowing to the Fort Belknap Reservation. An interlocutory order was granted and affirmed by the Circuit Court of Appeals for the Ninth Circuit. Upon the return of the case to the Circuit Court an order was taken *pro confesso* against five of the defendants. The appellants filed a joint and several answer upon which and the bill a decree was entered making preliminary injunction permanent. An appeal by the defendants who had answered was taken to the Circuit Court of Appeals for this Circuit without joining therein the other five defendants. Upon appeal thereafter to the Supreme Court the contention was made that neither the Circuit Court of Appeals nor the Supreme Court had jurisdiction because the five defaulting defendants had such interest in the case and decree that they should have joined in the appeal or proceedings in severance taken. Said the Supreme Court in holding no merit in the contention:

“The rule which requires the parties to a judgment or decree to join in an appeal or writ of error or be detached from the right by some proper proceeding, *or by their renunciation* is firmly established. But the rule only applies to joint judgments or decrees. In other words when the interest of a defendant is separate from that of other defendants he may appeal without them. Does the case at bar come within the rule? The bill does not distinguish the acts of the defendants, but it does not necessarily imply that there was

between them in the diversion of the waters of Milk River, concert of action or union of interest. The answer to the bill is joint and several, and in effect avers separate rights, interests and action on the part of the defendants. In other words whatever rights were asserted or admission of acts done by any one defendant had no dependence upon or relation to the acts of any other defendant in the appropriation or diversion of the water. If trespassers at all they were separate trespassers. Joinder in one suit did not necessarily identify them.

"Besides, the defendants other than appellants defaulted. A decree pro confesso was entered against them and thereafter according to equity rule 19, the cause was required to proceed ex parte and the matter of the bill decreed by the Court. Thomson v. Wooster, 114 U. S., 104, 29 L. Ed., 105, 5 Sup. Ct. Rep., 766. The decree was in due course made absolute; and granting that it might have been appealed from by the defaulting defendants they would have been, as said in Thomson v. Wooster, absolutely barred and precluded from questioning its correctness unless on the face of the bill, it appeared manifest that it was erroneous and improperly granted.

"Their rights therefore, were entirely different from those of the appellants; they were naked trespassers and conceded by their default the rights of the United States and the Indians, and were in no position to resist the prayer of the bill. But the appellants justified by counter rights and submitted those rights for judgment. There is nothing therefore in common between appellants and the other defendants. The motion to dismiss is denied."

We think this case is decisive of the question of the separateness of the judgment in this case. Williams

conceded by his default all the contentions of the bank, and was in no position to resist the prayer of the complaint. Richards on the contrary fought every material allegation of the complaint, and submitted his case for judgment. He could no more consistently have asked Williams to join in the writ than could Williams have consistently joined in it. Williams was bound by his default. If on the trial of the case the verdict had been rendered in favor of Richards on the question of the partnership and the making of the note, the result as to Williams would be no different. He had admitted by his default that he was bound jointly and *severally* and a several judgment could still have been entered up against him. If the judgment in this case were to be reversed Williams would still be bound in the full amount and interest and attorneys' fees prayed for in the complaint. If the judgment be affirmed it would remain unchanged as to Williams.

There is therefore nothing in common between Richards and Williams in this judgment, other than the joint judgment for costs, which would not require that Richards join or sever Williams or *vice versa*.

Higbee v. Chadwick, supra.

Second. It is well known that the reasons for requiring a severance where one of the parties fails to join in the appeal are that the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not

desire to have it reviewed, and that the appellate tribunal shall not be required to decide a second or third time the same question on the same record.

No such condition exists in this record as to cite the rule or require its enforcement. In the first place the defendant in error so far as Williams is concerned can enforce its default judgment now. Any action taken by this Court in the case on the merits cannot affect the right of the Bank in this respect. Even if this Court should reverse in favor of Richards the Bank would not be deterred from executing as to Williams. As was held in the case of *Winters v. United States, supra*, while Williams might have sued out a writ of error, yet he would be limited to showing "upon the face of the complaint it appeared manifest that it (the judgment) was erroneous and improperly granted."

We do not think any such contention could be successfully made as to the complaint herein. But the defendant Williams never had any intention to offer any defense to the action in the Court below. He never answered or appeared in any way until he came as we have shown voluntarily about 1,000 miles to act as a witness for the plaintiff in the case. We have filed on this motion his statement duly acknowledged that he had never had any intention to appeal from the decision of the lower Court, which renunciation takes this case outside of the rule ordinarily applicable on motions based on a failure to sever (*Winters v. United States, supra*). His whole atti-

tude throughout this litigation (beginning with his failure to answer the complaint) followed by his testifying for the plaintiff bank and against his co-defendant Richards, would be entirely inconsistent with any attempt to sue out a writ of error from the judgment complained of, even if by so doing he would not be bound by the limitation stated.

Williams was entirely indifferent. The record shows he had nothing. He made the note in controversy in his own and Richards' name, and he thought he had bound Richards (who had something) and whose property was attached. He had no personal defense to offer. Therefore he made none, but in order to avoid any complications with the Bank and the law because of his signing Richards' name without authority, ranged himself on the Bank's side and against his co-defendant. It is clear that Williams never intended to fight the action either in the court below or in this court and no one under the circumstances shown could have deemed it necessary (even if the judgment were admittedly joint) to ask him to join in an appeal from a judgment in the obtaining of which the record shows he was so active a participant.

From the facts and law it is apparent that it would have been futile for us to have invoked the provisions of Section 1005 of the Revised Statutes and ask that the writ of error be amended so as to include the name of the defendant Williams, even if it were a case where the Court would allow such procedure.

The reason for the exercise of the rule requiring notice and severance in order to avoid a multiplicity of appeals and to place the judgment creditor in a position to execute his judgment without delay, is absent in this case. The time had gone by for the suing out of another writ of error when the motion to dismiss was filed. The non-appealing defendant has filed his renunciation and waiver of right of appeal in this Court and nothing could be accomplished by the dismissal of the writ of error of Richards but a rank injustice.

We submit that the motion to dismiss be denied.

So far as the merits is concerned we do not think we can add anything further to our lengthy opening brief. For the reasons therein pointed out we ask a reversal of the judgment.

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Of Counsel.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EDWIN RICHARDS,

Plaintiff in Error,

VS.

AMERICAN BANK OF ALASKA
(a corporation),

Defendant in Error.

**PETITION OF DEFENDANT IN ERROR FOR
A REHEARING.**

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MCGOWAN & CLARK,

Of Counsel.

Filed this.....day of August, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2440

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWIN RICHARDS,

Plaintiff in Error,

VS.

AMERICAN BANK OF ALASKA

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Defendant in Error.

PETITION OF DEFENDANT IN ERROR FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

The defendant in error respectfully asks the Court to grant a *rehearing* of this cause upon the grounds hereinafter stated (all *italics* throughout this petition are *ours*).

THE MOTION TO DISMISS WRIT OF ERROR.

The motion to dismiss the writ of error should have been granted, because this case is *within* the

two reasons within which the opinion states the case must be to justify granting such a dismissal; and the case was *not* taken out of either of these reasons nor was the failure to obtain a severance below obviated by the appearance of Williams in *this* Court filed by the plaintiff in error when the case was heard upon the calendar of this Court in March, 1916.

I.

The Court *denied* our *motion to dismiss* the writ of error upon the authority of the *two* reasons given by the Supreme Court in *Masterson v. Hern- don*, 10 Wall. 416, where Justice Miller, after stating that the Court did not attach importance to the *technical mode* of proceeding called summons and severance, said:

“We should have held this appeal good *if it had appeared* in any way by the record that Maverick *had been notified* in writing *to appear*, and that he *failed* to appear, or, *if appearing*, had *refused* to join”,

and Your Honors quote Justice Miller:

“that without summons and severance the appeal *must* be dismissed” and state “the *reason* therefor to be, that *with* such summons and severance the Court below would be enabled *to execute* its decree as far as it could be executed *on the party who refused to join* in the appeal, and that party would be estopped from bringing *another* appeal for the same matter”,

again quoting Justice Miller, that

“The latter point is one to which this Court has always attached such importance,”

and Your Honors say:

“*In the present case both grounds for dismissal have been obviated by the appearance which Williams, the co-defendant with the plaintiff in error in the Court below, has filed in this Court.*”

There is absolutely nothing in the record and absolutely no showing that any notice was ever given or attempt at severance was ever made in the *Court below*, and *that* is the Court to which Justice Miller referred.

It undoubtedly escaped Your Honors' notice, that in *this* case, the judgment was entered April 20, 1914 (Tr. 20), and Richards obtained the *order* allowing the writ of error on April 21, 1914 (Tr. 289-290), the *writ* of error was issued May 2, 1914 (Tr. 292-293), and yet this *appearance* of Williams was *not filed* in this Court until the *hearing* on the calendar in March, 1916, nearly *two* years *after* the judgment was entered and writ of error issued, and this appearance was *never* filed in the Court below; and it was *not* even *signed* by Williams until June 9, 1915 (reply brief plaintiff in error, p. 21); not even then *filed in this Court* until March, 1916, nearly a year after it was signed by Williams.

The judgment below could not therefore be executed, and until his year to do so expired, Wil-

liams had the absolute right to sue out a writ of error.

Your Honors state that *one* of the reasons for requiring a joint defendant to join in the writ of error or be severed and shut out by notice to him to join, is, so that the Court and the prevailing party below *may execute* the judgment against the party *not* appealing; and yet that could not be done *in this* case and the Court and prevailing party were *prevented from executing* the judgment below, because there was *no severance* below, nor even appearance here until after nearly two years.

The *second* reason for requiring severance, given in the opinion, viz: that a *second writ* should not be allowed to be sued out by the joint party not appealing, also existed *in this* case, because, until the year to appeal expired, Williams had the *absolute right* to sue out a *second* writ of error, because no severance had been made.

So that, we respectfully ask Your Honors to notice, that *in this* case *both* of the *reasons* exist for requiring that there be a severance or notice to join in the writ and requiring a dismissal for the very reasons stated by Justice Miller.

And yet, the opinion in this case states:

“In the present case *both* grounds for dismissal have been *obviated* by the *appearance* of which Williams, the co-defendant with the plaintiff in error in the Court below, has *filed in this Court.*”

The Court will notice that even in the appearance of Williams in this Court nearly two years after the writ of error was sued out by Richards, there is no statement that he was *either asked or refused* to join in the appeal, nor notified to do so, nor was severance in the writ of error allowed by the Court below (reply brief, pp. 19, 21); and *Rule 63* of that Court expressly provides for *severance* procedure (brief of defendant in error, pp. 7-8).

The opinion makes no reference to the *two* cases decided *by this Court* (quoted in our brief, pages 8 to 13), in one of which the party appealing sought and was denied the right to amend, and in both of which cases Your Honors *dismissed* the appeal *because there was* no severance or attempt to sever; and both of which cases, we submit, require a dismissal of the writ of error in the present case.

We again *quote* these *two* decisions of Your Honors, in the *second* of which this Court quotes at length as authority requiring dismissal in that case, the Supreme Court decision in *Masterson v. Herndon*, 10 Wall. 416 (Justice Miller), which case in the present instance the opinion quotes as authority for *denying* a dismissal.

In *Copeland v. Waldron*, 133 Fed. 217, this Court, *Hawley*, District Judge, rendering the opinion, *Gilbert* and *Ross*, Circuit Judges, concurring, has so clearly and fully covered the several phases of

this motion to dismiss the writ of error, that we quote the entire decision:

“The motions herein made will be considered together. Appellants admit that the decree appealed from is joint, and that a joint decree should be appealed from by all, or severance made; that the fact that Pirie did not appear in the lower court furnishes no excuse for appellants leaving him out on the appeal; and that this court had the power to dismiss the appeal for want of his presence. But appellants claim that the contention of appellee that this court has no power to bring the omitted party in is not correct.

“We are of opinion that the facts of this case bring it within the rule announced by the Supreme Court in *Estis v. Trabue*, 128 U. S. 225, 229; 9 Sup. Ct. 58; 32 L. Ed. 437. After holding that a writ of error, in which the plaintiff and defendants were designated merely by the name of a firm containing the expression ‘& Co.,’ was not sufficient to give the court jurisdiction, but, inasmuch as the record disclosed the names of the persons composing the firm, allowed the writ to be amended, under section 1005 of the Revised Statutes (U. S. Comp. St. 1901, p. 714), the court said:

“‘But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against the claimants, and C. F. Robinson and John W. Dillard, their sureties in their “forthcoming bond,” jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties or as containing a judgment against the sureties, payable and enforceable only on a failure to

recover the amount from the claimants; and execution is awarded against all of the parties jointly. * * * It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ, or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered * * * Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. * * * It will then, of its own motion, dismiss the case, without awaiting the action of a party.'

"This case is directly in point. It is, however, argued that since the rendition of the decision the Supreme Court has changed its ruling, and accepted the views contended for by appellants; and our attention has been called to *Inland & Seaboard Coasting Co. v. Tolson*, 136 U. S. 572; 10 Sup. Ct. 1063; 34 L. Ed. 539, which it is claimed is 'strikingly illustrative' of their contention. The facts in that case were dissimilar from the case at bar. There Tolson recovered damages in the Supreme Court of the District of Columbia. The *Inland & Seaboard Coasting Company* was the sole defendant therein, and gave an undertaking with four sureties, and took an appeal to the general term, where the court, in accordance with its rule in such cases, when it affirmed the judgment of the special term, also entered judgment against the sureties in the undertaking. The writ of error, having been sued out without mentioning the sureties, was dismissed. In moving to rescind the judgment of dismissal, the plaintiff in error argued that the judgments of the general term 'were in fact and in law two judgments, and that the sureties were not parties to the tort suit'. The court contented itself

by a simple order granting the motion to rescind the dismissal, and allowed the writ of error to be amended so as to include the sureties. We are not prepared to say that in making this order there was necessarily any departure from the rule announced in *Estis v. Trabue*, and it is fair to presume that none was intended. Within five months after the decision in the *Tolson* case the Supreme Court decided *Mason v. United States*, 136 U. S. 581; 10 Sup. Ct. 1062; 34 L. Ed. 345, where a postmaster and his sureties were sued jointly for a breach of the bond, and he and a part of the sureties appeared and defended, the suit was abated as to one of the sureties, the others made default, and judgment of default was entered against them. The sureties who had appeared and defended the suit sued out a writ of error. A motion was made to amend the writ by adding the omitted parties, and the motion was denied.

“*Walton v. Marietta Chair Co.*, 157 U. S. 342, 346; 15 Sup. Ct. 626; 39 L. Ed. 725, furnishes an illustration of the character of cases where amendments to the writ of error should be allowed under the provisions of section 1005 of the Revised Statutes. They are cases where ‘the statement of the title of the action or parties thereto in the writ is defective’, or where the defect, whatever it be, ‘can be remedied by reference to the accompanying record’. This is also made clear by reference to the language of the statute. This is not a case where the appeal is merely defective in form.

“The truth is that the rule must be determined by the particular facts in each case as they arise. In the present case the record does not, as mentioned in the statement of facts, disclose that *James Pirie*, who was one of the three parties against whom the suit was brought to recover damages for breach of a joint con-

tract, and against whom judgment was rendered, was in any manner joined in the appeal, or that he was ever notified to join, or severed for failure or refusal to join. These things must appear to give this court jurisdiction of the appeal. As was said by the court in *Inglehart v. Stansbury*, 151 U.S. 68, 72; 14 Sup. Ct. 237; 38 L. Ed. 76:

“ ‘This could only be shown by a summons and severance, or by some equivalent proceeding, such as a request to the other defendants, and their refusal to join in the appeal, or at least a notice to them to appear, and their failure to do so; and this must be evidence upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter.’ ”

“The motion to dismiss is granted, and the motion to amend denied.”

In *Continental & C. T. & S. Bank v. Corey Bros. Const. Co.*, 205 Fed. 282, a decree was made awarding first liens, etc. to complainant by the District Court and two only of several defendants appealed. This Court, before *Gilbert, Ross* and *Hunt*, Circuit Judges, said:

“Sale of the property of the Irrigation Company was ordered, unless payment was made by it or by any of the other defendants. Equity of redemption of the defendants was to be forever barred, and terms of sale were prescribed in detail, the purchaser to hold the property free from all liens of all the parties to suit.

“From this decree, rendered December 27, 1912, the Continental & Commercial Trust & Savings Bank and Frank H. Jones, trustees,

appealed. Appeal was allowed March 26, 1913. It does not appear that any of the other parties defendant against whom the decree is rendered join in the appeal, or that they or any of them were notified to appear, and that they or any of them had failed to appear, or, if appearing, had refused to join in the appeal. Such a situation compels us to order a dismissal of the appeal.

“The Supreme Court, in *Masterson v. Hern-
don*, 77 U. S. (10 Wall.) 416, 19 L. Ed. 953, held
that it was established that, where the decree is
joint, all the parties against whom it is rendered
must join the appeal, or it will be dismissed.
The court said:

“ ‘We think there should be a written notice
and due service, or the record should show his
appearance and refusal, and that the court on
that ground granted an appeal to the party
who prayed for it, as to his own interest. Such
a proceeding would remove the objections made
to premitting one to appeal without joining
the other; that is, it would enable the court
below to execute its decree, so far as it could
be executed, on the party who refused to join,
and it would estop that party from bringing
another appeal for the same matter. The
latter point is one to which this court has al-
ways attached much importance, and it has
strictly adhered to the rule under which this
case must be dismissed, and also to the general
proposition that no decree can be appealed from
which is not final, in the sense of disposing of
the whole matter in controversy, so far as it
has been possible to adhere to it without hazard-
ing the substantial rights of parties interested.’
Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct.
39, 36 L. Ed. 933; *Sipperley v. Smith*, 155 U. S.
86, 15 Sup. Ct. 15, 39 L. Ed. 79; *Loveless v.
Ransom*, 107 Fed. 626, 46 C. C. A. 515; *Provi-
dent Life & Trust Co. v. Camden et al.*, 177

Fed. 854, 101 C. C. A. 68; *Ibbs v. Archer*, 185 Fed. 37, 107 C. C. A. 141; *Grand Island & W. C. R. Co. et al. v. Sweeney*, 103 Fed. 342, 43 C. C. A. 255.

“Holding, therefore, that we are without jurisdiction, the appeal will be dismissed.”

De Los Angeles v. Maytin, 216 U. S. 598, 601; 54 L. Ed. 632, 634. The Supreme Court, citing *Hardee v. Wilson*, 146 U. S. 179; 36 L. Ed. 933, said:

“The defendant, Mrs. Beatrice de Los Angeles, appealed, but, as the other defendants did not join in the appeal, and there was no summons and severance, the appeal must be dismissed.”

Mason v. U. S., 136 U. S. 541; 34 L. Ed. 541. The Court said this

“was a case where a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and part of the sureties appeared and defended. The suit was abated as to two of the sureties who had died, and the *other* sureties *made default and judgment by default* was entered against them. On the trial a verdict was rendered for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties *who appeared* sued out a writ of error to this judgment, *without joining* the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as complainants in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed. In *Feibelman v. Packard*, 108 U. S. 14; 27 L. Ed. 634, a writ of error was sued out *by one* of two or more joint defend-

ants, without a summons and severance or equivalent proceeding, and was therefore dismissed”.

Hughes, Federal Procedure, 2d Ed., p. 555, says:

“The reason why, *all* the parties must join where the judgment is *joint* is that *otherwise the Court could not execute its decree* on the parties who refused to join, and such parties might in their turn attempt to review the case also.”

The case of *Hill v. Western Electric Co.*, 214 Fed. 243, cited by Your Honors’ opinion, we submit, was not like the present, in any respect; that was a bankruptcy appeal; and we quote the *statement* of that Court relating to filing a similar waiver in the Circuit Court of Appeals, being apparently the reason why *that* Court denied a dismissal of the writ of error there. That Court said (p. 245):

“*No objection* has been made to this, and, on the contrary, counsel for the motion to dismiss have since confined their attention to the merits of the order of adjudication” (p. 245).

While in the present case we have constantly objected and consistently maintained that the writ of error should be dismissed.

We respectfully submit that the *two* cases above quoted determine this case and require a dismissal of the writ of error, these two cases were not only decided by this Court, but, with the exception of Judge Hawley in the first case, *both* cases were de-

cided by Your Honors now passing upon the same question in this case without any reference thereto and contrary to your decisions in the foregoing *two* cases.

The Supreme Court has held and this Court in the two cases just quoted, decided by Your Honors has likewise held, that severance in some way or other was necessary to give the Supreme Court and this Court *jurisdiction* of the writ of error.

We submit, that Your Honors should give us a further opportunity to be heard on this question, which in both of your former decisions was held to divest this Court of *jurisdiction* to pass upon the writ of error.

II.

THE INSTRUCTION HELD ERRONEOUS COULD NOT HAVE AFFECTED THE VERDICT, BECAUSE AT RICHARDS' REQUEST, THE COURT GAVE OTHER INSTRUCTIONS PREVENTING ANY POSSIBILITY OF THIS INSTRUCTION AFFECTING THE RESULT; AND THIS INSTRUCTION WAS THEREFORE CLEARLY HARMLESS.

The Court *reversed* the judgment in this case, because of a single *instruction* to the jury which the Court thought might have affected the result.

The *opinion* states:

“Error is assigned to the following instruction to the jury. ‘You should consider, therefore, whether or not the defendants Williams

and Richards entered into any partnership agreement *as alleged by the plaintiff*, and whether or not, if you find that they did enter into *such agreement*, it was contemplated thereby that said Williams should have authority to borrow money for the purposes of such partnership, and whether or not the moneys borrowed by him from the plaintiff were for *such purposes*.' The complaint had *alleged* that Williams and Richards were a mining copartnership, engaged in business in the Iditarod district. The answer denied the allegation. There was no evidence that a partnership agreement was ever entered into. In fact, the evidence was that no such agreement was made. If a partnership existed, it must be inferred from facts and circumstances, from the fact that the money was advanced by Richards to Williams and it was agreed that Williams was to 'go down there' and use his own judgment as to making the purchase. From these facts and from expressions used by both in the correspondence which followed, it would appear that there was a tacit understanding that they should be jointly interested in a quarter interest in Boulton's lease.

"The whole of the evidence in the case, and there is no evidence to the contrary, is that there was no thought, either by Richards or Williams, of a general copartnership. The utmost that can be claimed for the evidence is that their minds met upon a joint venture to purchase and perhaps to operate as a mining copartnership, a one-fourth interest in the lease then held by Boulton. There was no thought of the possibility of purchasing any other interest than that one-fourth, nor was there any suggestion of giving to Williams power to borrow money. The money which Richards had given him was ample for the purpose they had in view—\$2,000 for the pur-

chase of the one-fourth interest, \$500 for Williams' expenses. There was no testimony, and no deducible inference from the evidence which justified the submission to the jury of *the question whether it was contemplated by the agreement that Williams should have authority to borrow money for the purpose of such partnership*. The evidence, such as it was, was to the contrary, as witness the language with which Williams notified Richards that he had borrowed the \$3500: 'Now, Dick, how I got the money is the hardest part for me to tell. You may be angry, but I didn't do it with any selfish motive, or try to take advantage of the kindness you did for me.' *If it appeared from a special finding, or otherwise, that the jury's verdict was based on the ground that Richards subsequently ratified the act of Williams, we might pass over this assignment of error as harmless, but the verdict being general, we cannot say that the erroneous instruction so given did not affect the result.*"

INSTRUCTION REQUESTED BY RICHARDS AND GIVEN.

The plaintiff in error, Richards, requested the Court to give and the Court *did* give to the jury the following *instruction*, viz:

"The Court instructs the jury that a *mining* partnership can only exist where several parties co-operate in working mining property; mere ownership as tenants in common, either of the mining ground itself or a leasehold thereon, not being sufficient.

"*Where a mining copartnership is shown to exist within the definition above given, each partner has power to bind his copartners by dealing on credit and the giving of promissory*

notes for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; but one mining copartner has no implied power or authority to borrow money and sign the firm name to a promissory note as evidence of such loan, where the money is to be and is used in purchasing mining ground or interests therein or assignments of leases thereon, and if he does so without the knowledge or consent of his copartners, they are not liable thereon" (Tr. 263, 264).

The entire charge will be found in the transcript at pp. 247-256.

The Court had already stated the *issues* raised by the pleadings (Tr. 247-248), and then states the *contention* of the plaintiff and the *contention* of the defendant (Tr. 248-249).

The record shows that *opening statements* were made to the Court and jury by both sides (Tr. 21), also from counsel's own *exception* to part of charge (Tr. 258); to these *contentions* the Court refers, and they are *not* contained in the record; and the Court states: "On the part of the plaintiff it is *contended*" and "plaintiff further contends" (Tr. 248-249). "On the part of the defendant Richards it is *contended*" (Tr. 249).

The instruction set out in the opinion of the Court and because of which Your Honors reversed the judgment, follows right after this statement of the contentions of both sides; and it will be noticed that the trial Court *in* this instruction said:

“You should consider therefore, whether or not the defendants *entered into any partnership agreement as alleged by the plaintiff*” etc. (Tr. 249).

These *contentions* of the *plaintiff* did include the *contemplated* borrowing; and these *contentions* of the *defendants* stated by the Court did also include the *dispute and denial* of such *contemplated* borrowing; and it was under and in view of those conditions that the Court gave the *questioned* instruction and followed it up by the defendant Richards’ *requested* instruction above quoted (Tr. 249-250).

This *requested* instruction was then given (Tr. 250), and it expressly told the jury that

“where a *mining* partnership is shown to exist, *each partner has the power* to bind his co-partners by dealing on credit *and the giving of promissory notes* for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; *but one mining copartner has no implied power or authority to borrow money and sign the firm name to a promissory note* as evidence of such loan, *where the money is to be used in purchasing mining ground or interests therein or assignments of leases thereon, and if he does so without the knowledge or consent of his copartners, they are not liable thereon*” (Tr. 263, 264).

We respectfully submit that *this requested* instruction is *substantially the same* as the *other* instruction which the Court holds erroneous.

This instruction, requested by Richards and given by the Court, certainly removed any pos-

sible error that might exist in the other single instruction because of the giving of which this Court reversed the judgment.

III.

We also submit the Court is mistaken in its opinion, wherein it is stated that there was absolutely *no evidence* of it being *contemplated* in their agreement that any other interest should be purchased.

The witness Williams, whose testimony the opinion quotes, also testified, according to the question asked Richards by his own counsel:

“Q. You heard Williams’ testimony at this second trial, that in the N. C. Company’s store there, apparently in the presence of Mr. Curtis, you told him that when he got down there if he needed any more money you would go stronger than you had already. What do you say about that?”

A. No, sir. I never said no such thing” (Tr. 200).

Williams *did* testify as follows:

“I was supposed to make a purchase. I was to use my own judgment, in reference to any transaction. If I purchased anything I was to work it I suppose” (Tr. 25). “I remember Mr. Richards saying in the store: ‘If there is no confliction with that ground, we will go stronger than that’ ” (Tr. 26). “We talked the

matter over, the Boulton lay" (Tr. 27). "Q. Did you *borrow* the money from Mr. Richards? A. No, sir" (Tr. 29).

Richards also told Joseph H. *Egler* (witness for the plaintiff) whom he wanted to take that proposition off his hands, he was interested and to the extent of \$6,000 as follows:

"Q. Did you, in that conversation with Mr. Richards, discuss with him anything about purchasing any interest that he had—any mining interests?

A. Well, the conversation that I had with Mr. Richards was, he wanted to know if I didn't want to take that proposition off his hands.

A. We were talking about mining matters. He was mining at that time on Cache Creek, and I was mining on Tofty. And he wanted to know if I didn't want to take up that proposition in the Iditarod. I told him at the time I didn't know. I said, 'What will it cost?' He says, '*I am in about six thousand dollars.*' I told him I couldn't handle it, because I had spread out too much myself. And that was about all the conversation in reference to that that I can recollect of at the present time" (Tr. 148-149).

We respectfully submit that a rehearing should be granted; and that a re-examination and consideration of the record and the whole case would certainly disclose that the *single instruction* because of which the Court reversed the judgment, did not and could not possibly affect the verdict

or result, or injure the plaintiff in error before or with the jury in any respect.

Dated, San Francisco,

August 1, 1916.

CHARLES J. HEGGERTY,

THOMAS A. MCGOWAN,

JOHN A. CLARK,

*Attorneys for Defendant in Error
and Petitioner.*

KNIGHT & HEGGERTY,

MCGOWAN & CLARK,

Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for defendant in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CHARLES J. HEGGERTY,

*Of Counsel for Defendant in Error
and Petitioner.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

THE SOUTHERN PACIFIC COMPANY, a Cor-
poration,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

Filed

AUG 10 1914

F. D. Monckton,
Clerk.

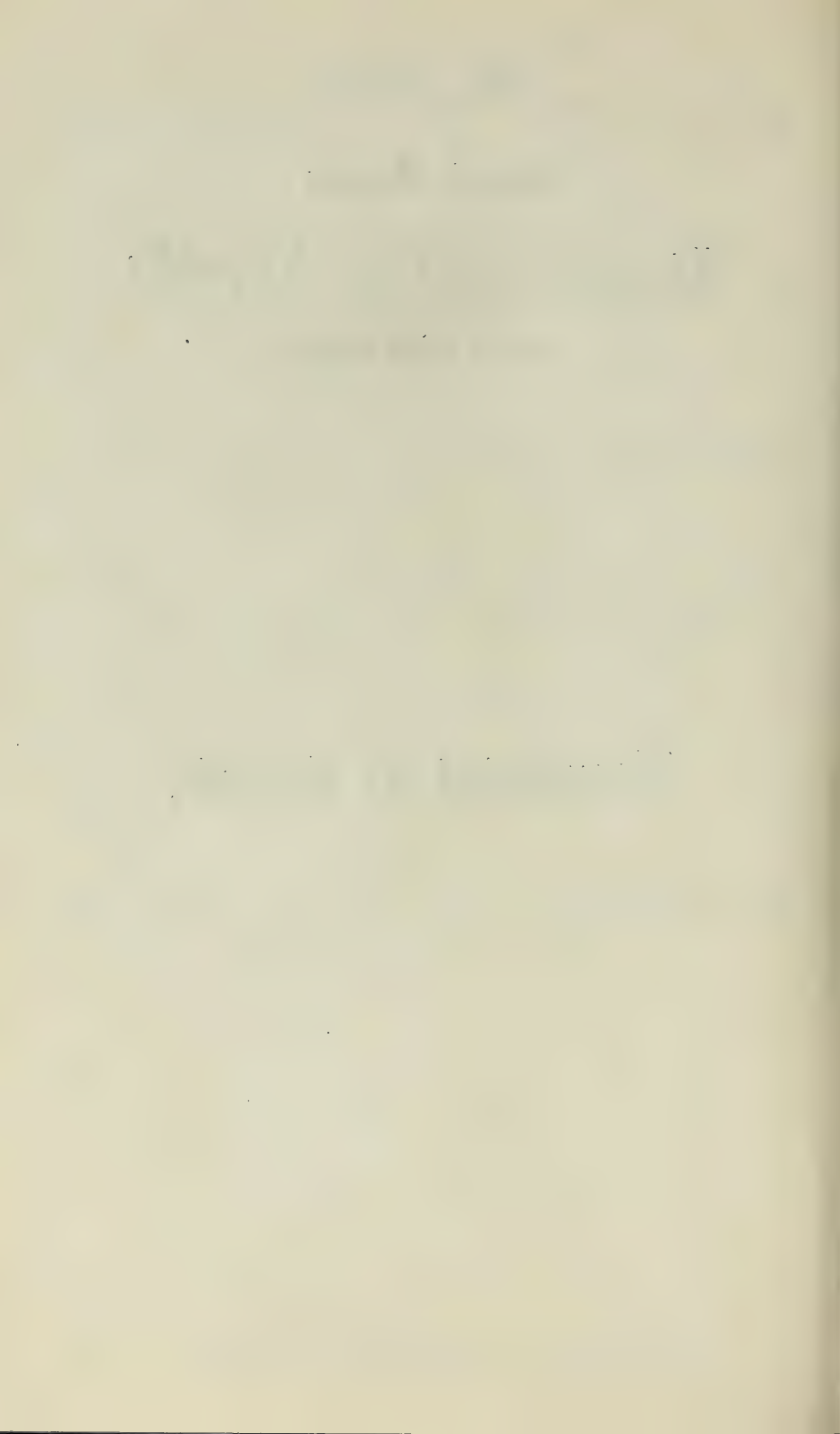
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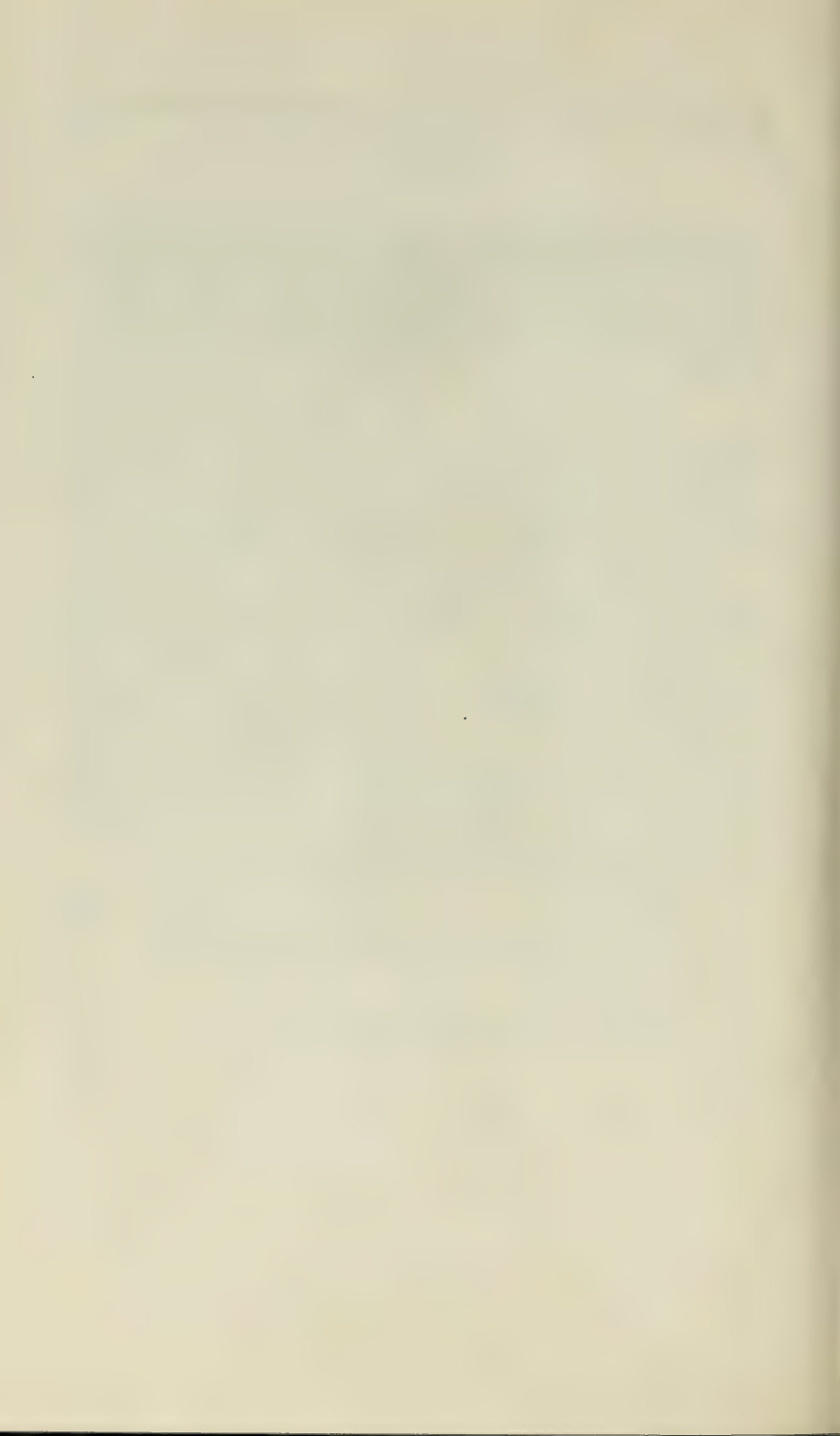
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of the District of Arizona.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

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SAMUEL L. PATTEE, Esquire,
Counsel for the Plaintiff.

FRANCIS M. HARTMAN, Esquire,

FRANK COX, Esquire,

B. O. BAKER, Esquire,
Counsel for the Defendant.

[Complaint.]

*In the District Court of the United States for the
District of Arizona, ——— Division.*

No. 2098.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

Now comes the United States of America, by Joseph E. Morrison, United States Attorney for the District of Arizona, and brings this action on behalf of the United States against the Southern Pacific Company, a corporation organized and doing business under the laws of the State of Kentucky, and having an office and place of business at Benson, in the State of Arizona; this action being brought upon the suggestion of the Attorney General of the United States at the request of the Interstate Commerce

Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit: Billy F. Eaker, to be and remain on duty as such for a longer period [1*] than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the hour of 10:29 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is lia-

*Page-number appearing at foot of page of original certified Record.

ble to plaintiff in the sum of five hundred dollars.

FOR A SECOND CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the time mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit: Frank H. Kempf, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the hour of 10:29 A. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic. [2]

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A THIRD CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the time mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Benson in the State of Arizona, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit: B. T. Sullivan, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the hour of 12:40 o'clock A. M., on December 22, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FOURTH CAUSE OF ACTION, plain-

tiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and [3] travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico and Benson, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain trainmen and employee, to wit: W. E. Brown, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the hour of 12:40 A. M., on December 22, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FIFTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the

times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Benson, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: H. F. Peacock, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the [4] hour of 12:40 o'clock A. M., on December 22, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A SIXTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the

times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Benson, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit, C. G. Harrison, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:30 o'clock A. M., on said date, to the hour of 12:40 o'clock A. M., on December 22, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[5]

FOR A SEVENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during

all the time mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit: C. J. Maben, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[6]

FOR AN EIGHTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all

the time mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit: J. E. Anderson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[7]

FOR A NINTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the

time mentioned herein, a common carrier engaged in interstate commerce by railroad in the States of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit: C. A. Owens, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[8]

FOR A TENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during

all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: J. F. Weathered, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[9]

FOR AN ELEVENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was dur-

ing all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: G. Davis, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[10]

FOR A TWELFTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was dur-

ing all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: E. Leinen, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train Extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[11]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of six thousand dollars and

its costs herein expended.

JOSEPH E. MORRISON,

United States Attorney.

[Endorsements]: No. 5 (Tucson). No. 100. District Court of United States, District of Arizona. The United States of America, vs. Southern Pacific Company. Complaint. 16 Hour Service Law. Filed Aug. 14, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. [12]

[Answer.]

*In the District Court of the United States for the
District of Arizona.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Comes now the above-named defendant, Southern Pacific Company, and answering plaintiff's complaint on file herein, admits and denies as follows:

Admits that it is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and that it has an office and place of business at Benson, in the State of Arizona.

Admits that during all the times mentioned in plaintiff's complaint herein defendant was and is a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Answering plaintiff's alleged first cause of action,

set out in its complaint on file herein, defendant specifically denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of [13] Arizona, within the jurisdiction of the court, or at any other time, or place, or at all, required or permitted its certain engineer and employee, to wit: Billy F. Eaker, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said Billy F. Eaker was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted Billy F. Eaker to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said Act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dol-

lars, or in any other sum, or amount, or at all.

Answering plaintiff's alleged second cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of [14] Arizona, within the jurisdiction of the court, or at any other time, or place, or at all, required or permitted its certain fireman and employee, to wit: Frank H. Kempf, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said Frank H. Kempf was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted Frank H. Kempf to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant vio-

lated the said Act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amount, or at all.

Answering plaintiff's alleged third cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of [15] Arizona, within the jurisdiction of the court, or at any other time, or place, or at all, required or permitted its certain conductor and employee, to wit: B. T. Sullivan, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said B. T. Sullivan was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted B. T. Sullivan to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that the time and place or times

and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said Act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amount, or at all.

Answering plaintiff's alleged fourth cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of [16] Arizona, within the jurisdiction of this court, or at any other time, or place, or at all, required or permitted its certain trainman and employee, to wit: W. E. Brown, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said W. E. Brown was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted W. E. Brown to remain on duty continuously for more than sixteen

consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said Act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amounts, or at all.

Answering plaintiff's alleged fifth cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of [17] Arizona, within the jurisdiction of this court, or at any other time, or place, or at all, required or permitted its certain train man and employee, to wit: H. F. Peacock, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said H. F. Peacock was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that

defendant required or permitted H. F. Peacock to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said Act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amount, or at all.

Answering plaintiff's alleged sixth cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the Act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the state of [18] Arizona, within the jurisdiction of this court, or at any other time, or place, or at all, required or permitted its certain trainman and employee, to wit: C. G. Harrison, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said C. G. Harrison was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and

that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted C. G. Harrison to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said Act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amount, or at all.

Defendant, for its answer herein to plaintiff's alleged causes of action Nos. 7, 8, 9, 10, 11, and 12, in its complaint herein contained, admits that during all the time mentioned therein it was a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Admits that the persons named in the above-numbered counts in plaintiff's complaint were at the time mentioned employees of the defendant company.
[19]

Admits that the said persons, constituting the crew of extra No. 2794, mentioned in plaintiff's complaint, were called to leave Tucson at 5:50 A. M., which would put them on duty at 5:20 A. M., of the date mentioned, and were each and all of them relieved at 10:50 P. M., of the same date.

The defendant alleges, by way of relief and exoneration from the provisions of the statute in plaintiff's said complaint set out, that the said extra train No. 2794 was delayed and detained en route at a

station called Esmond, in the county of Pima, State of Arizona, while en route on the day and date named in plaintiff's complaint for the period of one hour and thirty minutes on account of and by reason of the said train breaking-in-two, and that the said break-in-two and delay of one hour and thirty minutes was the result of a cause not known to the defendant or its officers, agents, or any of them in charge of said train and of such employees at the time said train and employees left Tucson, the terminal, from which it started at ——— A. M., on said date; and that the same was caused by an unavoidable accident and one that could not have been foreseen by this defendant or any of its officers, agents or employees; all of which and the time of delay was promptly reported to the Interstate Commerce Commission by the defendant herein, together with the defendant's claim of exemption for the one hour and thirty minutes delay at Esmond as aforesaid.

WHEREFORE, defendant prays that the delay of one hour and thirty minutes, by reason of the unavoidable accident as aforesaid, be allowed defendant, and that the provisions of this act shall not apply to this defendant in the alleged causes of action contained in counts seven, eight, nine, ten, eleven and twelve set forth in plaintiff's complaint, and that the defendant go hence without day, together with its costs.

FRANK COX and
FRANCIS M. HARTMAN,
Attorneys for Defendant. [20]

Received copy of this answer on September 19th, 1913.

J. E. MORRISON,
U. S. Attorney.

[Endorsement]: No. 5 (Tucson). No. 100. In the District Court of the United States for the District of Arizona. The United States of America, Plaintiff, vs. Southern Pacific Company, Defendant. Defendant's Answer. Frank Cox, Phoenix, Arizona, Francis M. Hartman, Tucson, Arizona, Attorneys for Defendant. Filed Sept. 18, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. [21]

*In the District Court of the United States for the
District of Arizona.*

No. 5.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

Demurrer to Answer.

Now comes the above-named plaintiff, by its attorney, and demurs to that part of the defendant's answer filed herein relating to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action of plaintiff's petition, and assigns the following grounds of demurrer:

1. It does not appear that the breaking-in-two of the train at Esmond, and the delay thereto, was not

known to the defendant, or its officer or agent in charge of said employees at the time they left a terminal.

2. It does not appear that the breaking-in-two of the train at Esmond prevented the defendant from relieving the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

3. It does not appear that the failure of the defendant to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours was due to a casualty of unavoidable accident or the act of God; or that the failure to so relieve such employee was the result of a cause not known to the defendant or its officer or agent in charge of such employee at the time he left a terminal and which could not have been foreseen.

4. It does not appear that the defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours. [22]

5. The facts pleaded do not constitute a defense to any of said causes of action.

THOMAS A. FLYNN,
United States Attorney.

[Endorsement]: No. 5. (Tucson). In the District Court of the United States, Dist. of Arizona. The United States of America vs. Southern Pacific Company. Demurrer to Answer. Thos. A. Flynn, Phoenix, Arizona, Attorney for Plaintiff. Filed May 18, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [23]

**[Motion of Defendant for Judgment on Pleadings,
etc.]**

*In the United States District Court for the District
of Arizona.*

No. 5.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Now comes the above-named defendant, Southern Pacific Company, by its attorneys, and moves for judgment in its favor on the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action of plaintiff's petition.

FRANK COX,

FRANCIS M. HARTMAN,

B. O. BAKER,

Attorneys for Defendant.

[Endorsement]: No. 5 (Tucson). In the United States District Court for the District of Arizona. United States of America, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Motion for Judgment on the Pleadings as to Counts Seven, Eight, Nine, Ten, Eleven, and Twelve. Filed May 22, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [24]

[Minutes of Court—May 21, 1914.]

*In the United States District Court, District of
Arizona.*

Minute Entry of Thursday, May 21st, 1914.

No. 5 (TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

On this day this cause came on for hearing on the demurrer of the plaintiff to the answer of the defendant to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action set forth in the complaint, and said demurrer was thereupon argued by M. C. List, Esquire, on behalf of the plaintiff, and by Francis M. Hartman, Esquire, on behalf of the defendant, and was submitted to the Court for decision, and thereupon it was ordered that said demurrer be overruled, to which order and ruling of the court, the plaintiff, by its counsel, then and there in open court excepted. The plaintiff declined to amend its complaint with respect to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action set forth therein, and declined to plead further with respect thereto, but elected to stand upon the pleadings, and thereupon the cause was called for trial upon the 1st, 2d, 3d, 4th, 5th, and 6th causes of action set forth in the complaint. Whereupon the Clerk was ordered to

draw eighteen names from the box wherein he had deposited in the presence of the Court the names of the jurors summoned and not excused, and the names of eighteen persons were thereupon drawn and all answering thereto respectively, took their places in the jury-box. The said jurors were then sworn and examined on their *voir dire*. The panel being now full and complete, and said jurors in the jury-box having been passed for cause by both the plaintiff and the defendant, the respective parties exercise their right of peremptory challenge, and the following named jurors were called according to law to constitute the jury, viz.: A. Shapard, J. W. Kellum, Richard Starr, Harry P. Suman, Kenneth Brown, H. F. Schurrer, W. G. Powers, J. E. Lindley, S. M. Warner, C. A. Beardsley, Wm. Powers, and Don Blankenship, who were duly sworn [25] to well and truly try the issues joined between the United States of America and the defendant herein. E. B. Van Vreen was duly sworn as court reporter herein. The respective counsel then read aloud the pleadings herein to the jury and stated the issues to be tried herein. Upon motion of the plaintiff, it is ordered that all witnesses be called and placed under the rule and thereupon Frank H. Kempf, Billy F. Eaker, B. T. Sullivan, H. F. Peacock, C. G. Harrison, and J. H. Dyer, were called as witnesses for the plaintiff, sworn and placed under the rule; and W. Wilson, J. E. Lovejoy were called as witnesses for the defendant, sworn and placed under the rule. The plaintiff then, to maintain upon its part the issues herein, called as witness Wm. Wilson, who was

duly examined and cross-examined, and offered in evidence two exhibits, Exhibits "A" and "B," which were admitted in evidence and filed, and this being the regular time for adjournment of this court, the Court duly instructed the jury and excused them from further service in this case until Friday, the 22d day of May, A. D. 1914, at ten o'clock A. M., to which time the further trial of this case is now ordered continued. [26]

[Minutes of Court—May 22, 1914.]

*In the United States District Court, District of
Arizona.*

Minute Entry of Friday, May 22d, 1914.

No. 5 (TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

This case having been continued from Thursday, May 21st, 1914, come now the same parties hereto and come also the jurors herein, their names are called and all answering thereto, respectively, the further trial of the case proceeds as follows: The plaintiff, to further maintain upon its part the issue herein, recalled Wm. Wilson for further examination in chief, and called as witnesses, B. T. Sullivan and Billy F. Eaker, who were duly examined and

cross-examined, and offered in evidence three exhibits, Exhibits "C," "D," and "E," which were admitted and filed, and thereupon the plaintiff rested its case. The defendant then, to maintain upon its part the issues herein called as witness, J. E. Lovejoy, who was duly examined and cross-examined, and offered in evidence four exhibits, "Exhibits 1, 2, 6, and 7," which were admitted and filed, and three exhibits, "Exhibits 3, 4, and 5," which were rejected and filed, and thereupon the defendant rested its case. The plaintiff then made and filed motion that the Court direct the jury to return a verdict in favor of the plaintiff upon the 1st and 2d, and upon the 3d, 4th, 5th, and 6th causes of action, and the defendant made and filed its motion that the Court direct the jury to return a verdict in favor of the defendant upon said cause of action and that in case said motion should be denied that it have leave to go to the jury. After hearing argument of counsel for the respective parties, the Court denied the motion of the defendant and granted that of the plaintiff and directed the jury to find for the plaintiff upon the 1st, 2d, 3d, 4th, 5th, and 6th causes of action, to which ruling of the Court in denying its motion to [27] direct a verdict and in directing the jury to return a verdict for the plaintiff, the defendant, by its counsel, then and there in open court excepted. Thereupon, by direction of the Court, the jury returned the following verdict:

No. 5.

“UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find for the said plaintiff as to each and all of the counts from one to six, inclusive.

K. B. BROWN,
Foreman.”

Whereupon, said jury was ordered discharged from this case.

Thereupon the defendant moved for judgment in its favor upon the 7th, 8th, 9th, 10th, 11th, and 12th causes of action set forth in the complaint, and it was thereupon ordered that judgment be entered in favor of the plaintiff upon the 1st, 2d, 3d, 4th, 5th, and 6th causes of action, and for the defendant upon the 7th, 8th, 9th, 10th, 11th, and 12th causes of action, the plaintiff, by its counsel, then and there in open court, excepted, and to which order and ruling of the Court in directing the entry of judgment in favor of the plaintiff upon the 1st, 2d, 3d, 4th, 5th, and 6th causes of action, the defendant then and there in open court excepted. [28]

[Judgment.]

*In the United States District Court, District of
Arizona.*

Judgment Made and Entered on Friday, May 22d,
1914.

No. 5 (TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

This case came on for trial before the above-named court on the 21st day of May, 1914, at the regular May, 1914, Term thereof, held at Tucson, Thomas A. Flynn, United States Attorney, M. C. List, and Samuel L. Pattee, appearing as attorneys for the plaintiff, and Francis M. Hartman, Esquire, and B. O. Baker, Esquire, appearing as attorneys for the defendant; thereupon the plaintiff demurred to the answer of the defendant to the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action set forth in the complaint of plaintiff, and, after argument, it was ordered that said demurrer be overruled; thereupon a jury was empaneled and the cause proceeded to trial upon the first, second, third, fourth, fifth and sixth causes of action set forth in the complaint, and evidence was introduced on behalf of the respective parties, and at the close of the evidence the

Court instructed the jury to return a verdict in favor of plaintiff upon the first, second, third, fourth, fifth, and sixth causes of action aforesaid, and thereupon the jury returned a verdict in favor of the plaintiff upon each and all of said causes of action; and the plaintiff having elected to stand upon its demurrer to the answer to the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action and not to plead further with respect thereto, it was ordered that judgment be entered in favor of the defendant upon those causes of action; thereafter the Court fixed and determined the penalty to be imposed upon each of the causes of action so found in favor of the plaintiff, as follows, upon the [29] first and second causes of action, at the sum of One Dollar (\$1.00) each, and upon the third, fourth, fifth, and sixth causes of action, at the sum of One Hundred Dollars (\$100.00) each, and did order judgment be entered accordingly;

Now, therefore, pursuant to said orders for judgment and the proceedings aforesaid, it is hereby

ORDERED, ADJUDGED AND DECREED, that the plaintiff, the United States of America, do have and recover of and from the defendant, Southern Pacific Company, a corporation, the sum of Four Hundred and Two Dollars (\$402.00), the amount of penalties fixed as aforesaid and that it do have execution therefor.

And it is further ORDERED, ADJUDGED AND DECREED, that the said plaintiff take nothing by the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action in its complaint, and that

as to each and all those causes of action the defendant go hence without day.

And it is further ORDERED, ADJUDGED AND DECREED, that neither party recover any costs against the other, but that each party pay all costs incurred by it.

In accordance with the stipulation this day made by the parties hereto, it is ORDERED that the execution on said judgment be stayed for forty-two days from the date of said verdict. [30]

*In the District Court of the United States for the
District of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Petition for Writ of Error.

Now comes the United States of America, by Samuel L. Pattee, Assistant United States Attorney for the District *Attorney*, and respectfully shows:

1. That this action is brought to recover certain penalties arising under the Act of Congress commonly known as the "Hours of Service" act.

2. The petition or complaint in this action contains twelve counts or causes of action. On the 22d day of May, 1914, pursuant to an order heretofore made by the above-named court, judgment was rendered and entered herein in favor of the defendant, Southern

Pacific Company, upon the counts or causes of action numbered 6, 7, 8, 9, 10, 11, and 12. That the United States of America, feeling aggrieved by the said judgment upon said causes of action, desires to have the same reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and to that end applies for the allowance of a writ of error and the signing of citation.

Dated June, 15th, 1914.

SAMUEL L. PATTEE,

Assistant United States Attorney for the District
of Arizona.

[Endorsement]: No. 5. In the District Court of the United States for the District of Arizona. United States of America, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Petition for Writ of Error. Filed June 15, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.
[31]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant in Error.

Assignments of Error.

And now comes the United States of America, by Thomas A. Flynn, United States Attorney for the

District of Arizona, and says that in the record and proceedings herein in the District Court of the United States for the District of Arizona, there is manifest error to the great prejudice of the said United States of America, in this, to wit:

1. The said District Court of the United States for the District of Arizona erred in overruling the Demurrer of the United States of America to the answer of the said Southern Pacific Company to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action set forth in the petition or complaint herein for the reason that it does not appear from the said answer that the breaking-in-two of the train mentioned in said answer at Esmond, and the delay thereto, was not known to the said Southern Pacific Company, or its officer or agent in charge of the employees mentioned in said causes of action at the time they left a terminal.

2. The said District Court erred in overruling the said demurrer for the reason that it does not appear from said answer that the breaking-in-two of said train at Esmond prevented the said Southern Pacific Company from relieving the employee mentioned in any of said causes of action before he had been continuously on duty more than sixteen hours.

3. The said District Court erred in overruling said demurrer for the reason that it does not appear from the said answer that the failure of the said Southern Pacific Company to relieve the employee named in any of said causes of action before he had been continuously [32] on duty more than sixteen hours was due to a casualty or unavoidable accident or

the act of God; or that the failure so to relieve such employee was the result of a cause not known to said Southern Pacific Company or its officer or agent in charge of such employee at the time he left a terminal and which could not have been foreseen.

4. The said District Court erred in overruling said demurrer for the reason that it does not appear from the said answer that the said Southern Pacific Company made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

5. The said District Court erred in overruling said demurrer, for the reason that the matters set forth therein as a defense to said causes of action are insufficient in law to constitute a defense to any of said causes of action.

6. The said District Court erred in rendering judgment in favor of said Southern Pacific Company and against the said United States of America upon the 7th, 8th, 9th, 10th, 11th, and 12th causes of action set forth in said petition or complaint, for the reasons stated in the foregoing assignments of error.

Wherefore, by reason of the errors aforesaid, the said United States of America prays that the judgment rendered and entered in this action, so far as the same relates to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action aforesaid, be avoided, annulled and reversed, and that judgment be rendered thereon

in favor of the said United States of America.

THOMAS A. FLYNN,

United States Attorney for the District of Arizona.

By SAMUEL L. PATTEE,

Assistant United States Attorney.

[Endorsement]: No. 5. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. Southern Pacific Company, a Corporation, Defendant in Error. Assignments of Error. Filed June 15th, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [33]

UNITED STATES OF AMERICA.

*District Court of the United States, District of
Arizona.*

Clerk's Office.

No. 5 (TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Praeceptum [for Transcript of Record].

To the Clerk of said Court:

Sir: Please prepare and forward to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, transcript of record in the above-entitled action, upon a Writ of Error heretofore

sued out by the United States of America; said transcript to consist of the following papers:

1. The Bill of Complaint.
2. The Answer.
3. The Demurrer to the Answer.
4. The defendant's motion for judgment on the pleadings as to Counts Seven, Eight, Nine, Ten, Eleven and Twelve.
5. The minute entries of the trial, including the judgment.
6. The Petition for Writ of Error.
7. The Assignments of Error.
8. The Praecipe.

Also the Original Writ of Error and Citation, and the proper certificate as to the transcript.

SAMUEL L. PATTEE,

Assistant United States Attorney.

[Endorsement]: No. 5 (Tucson). U. S. District Court, District of Arizona. United States of America, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant. Praecipe for Transcript of Record. Filed June 30, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [34]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Arizona.

United States of America,

District of Arizona,—ss.

I, George W. Lewis, Clerk of the District Court

of the United States for the District of Arizona, do hereby certify that I am the custodian of the Records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of United States of America, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant, said case being No. 5 (Tucson), on the docket of said court.

I further certify that the attached transcript contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such Clerk in the City of Tucson, State and District aforesaid.

WITNESS my hand and the seal of said United States District Court this 2d day of July, A. D. 1914.

[Seal]

GEORGE W. LEWIS,

Clerk United States District Court, District of Arizona.

By Effie D. Botts,
Deputy Clerk. [35]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Judges of the District Court of the United
States for the District of Arizona, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court of the United States, for the
District of Arizona, before you, or some of you, be-
tween the United States of America, plaintiff, and
Southern Pacific Company, a corporation, defend-
ant, a manifest error hath happened, to the great
damage of the United States of America, as it is said
and by its complaint appears;

We, being willing that such error, if any hath been,
should be duly corrected, and full and speedy justice
done to the parties aforesaid in this behalf, do com-
mand you, if judgment be therein given, that then,
under your seal, distinctly and openly, you send the
record and proceedings aforesaid, with all things con-
cerning the same, to the United States Circuit Court
of Appeals for the Ninth Circuit, together with this

writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, on the 14th day of July, A. D. 1914, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done. [36]

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 15th day of June, in the year of our Lord one thousand nine hundred and fourteen.

GEORGE W. LEWIS,

Clerk of the District Court of the United States for the District of Arizona.

By Effie D. Botts,
Deputy Clerk.

Allowed by:

WM. H. SAWTELLE,

United States District Judge, District of Arizona.
[37]

[Endorsed]: No. 5. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. Southern Pacific Company, a Corporation, Defendant in Error. Writ of Error. Filed June 15, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [38]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant in Error.

Citation on Writ of Error.

United States of America,—ss.

To Southern Pacific Company, a Corporation, Greet-
ing:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, on the 14th day of July, A. D. 1914, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the District of Arizona, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United States, this 15th day of June, in the year of our Lord

one thousand nine hundred and fourteen.

WM. H. SAWTELLE,

United States District Judge, District of Arizona.

[39]

[Endorsed]: No. 5. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. Southern Pacific Company, a Corporation, Defendant in Error. Citation on Writ of Error. Due service of the within citation and receipt of a copy thereof is hereby acknowledged this 16th day of June, 1914. Francis M. Hartman, Attorney for Defendant in Error. Filed June 16, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [40]

[Endorsed]: No. 2443. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. The Southern Pacific Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

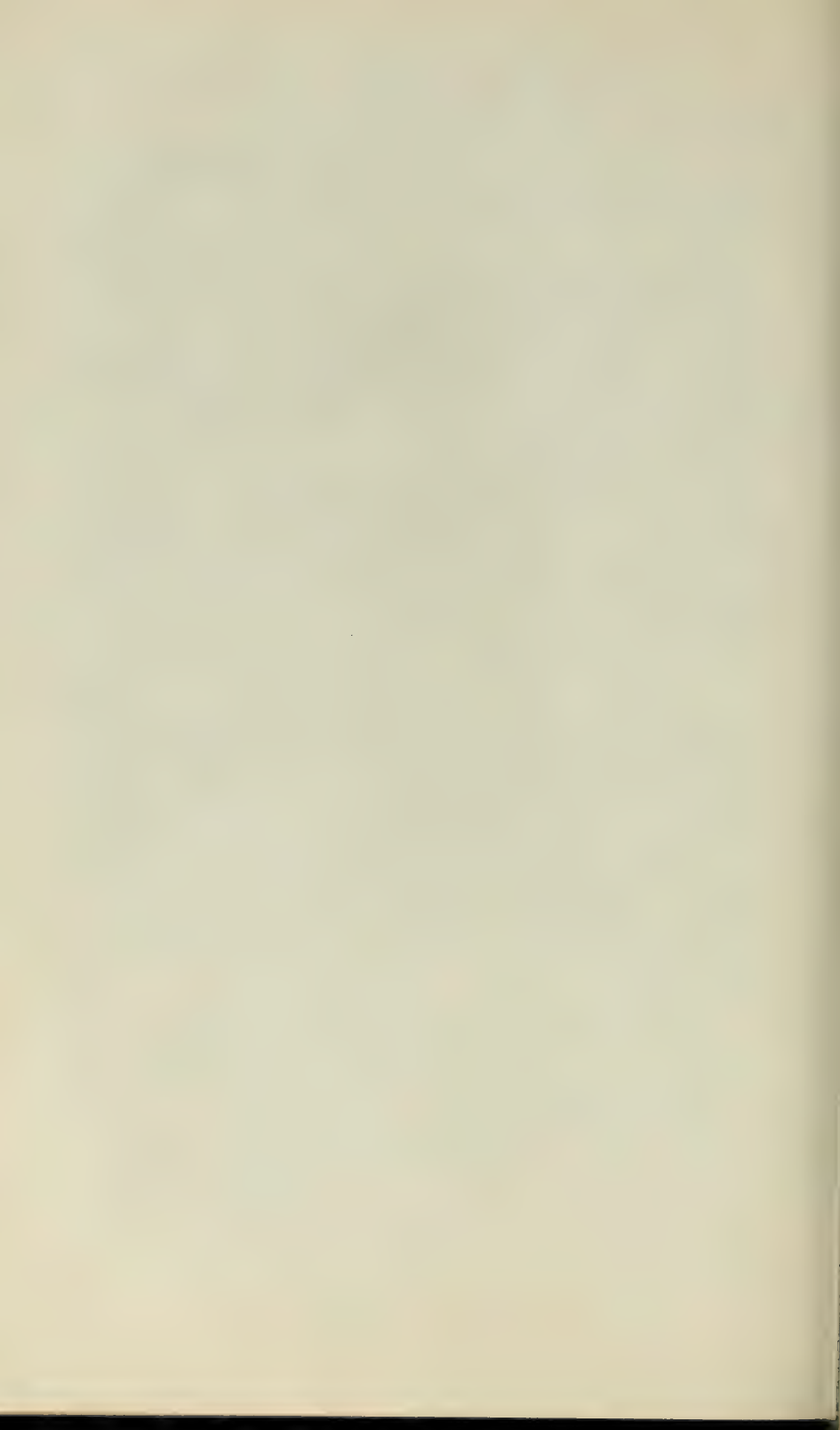
Received and filed July 7, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.



7

No. 2443.

**In the United States Circuit Court of
Appeals, Ninth Circuit.**

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR.

v.

THE SOUTHERN PACIFIC COMPANY, DEFENDANT IN
ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF ARIZONA.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

THOMAS A. FLYNN,
United States Attorney.

SAMUEL L. PATTEE,
Assistant United States Attorney.

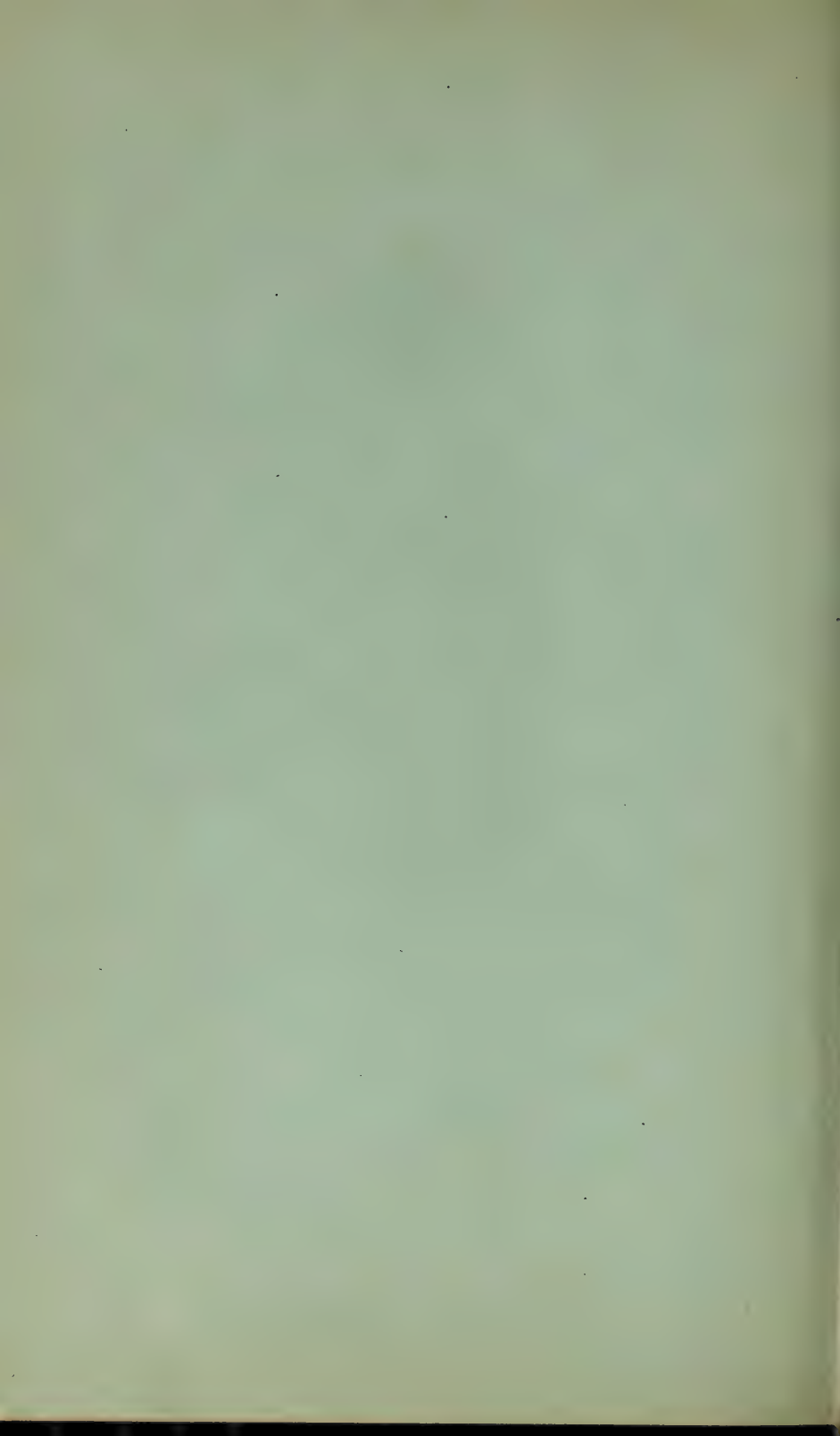
MONROE C. LIST,
Special Assistant to United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

Filed

SEP 2 - 1914

F. D. Moulton,
Clerk.



In the United States Circuit Court of Appeals, Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error.	} No. 2443.
<i>v.</i>	
THE SOUTHERN PACIFIC COMPANY, DEFENDANT in error.	

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

This suit was instituted by the Government to recover from the defendant penalties for 12 alleged violations of the Federal hours-of-service act.

The first six causes of action were disposed of by trial; the last six by the demurrer of the Government to the defendant's answer; and it is because of the action of the trial court in overruling this demurrer and entering judgment for the defendant that the Government sued out its writ of error.

These last six causes of action relate to certain employees of the defendant engaged in the operation of a train engaged in hauling interstate traffic

between Tucson and Bowie, Ariz. The petition alleges that while so employed they were kept in continuous service 17 hours and 30 minutes. (Rec., 7-13.)

The defendant filed the following answer (Rec., pp. 21, 22) to these several causes of action:

Defendant, for its answer herein to plaintiff's alleged causes of action Nos. 7, 8, 9, 10, 11, and 12, in its complaint herein contained, admits that during all the times mentioned therein it was a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Admits that the persons named in the above-numbered counts in plaintiff's complaint were at the time mentioned employees of the defendant company.

Admits that said persons, constituting the crew of extra No. 2794, mentioned in plaintiff's complaint, were called to leave Tucson at 5.50 a. m., which would put them on duty at 5.20 a. m. of the date mentioned, and were each and all of them relieved at 10.50 p. m. of the same date.

The defendant alleges, by way of relief and exoneration from the provisions of the statute in plaintiff's said complaint set out, that the said extra train No. 2794 was delayed and detained en route at a station called Esmond, in the county of Pima, State of Arizona, while en route on the day and date named in plaintiff's complaint for the period of 1 hour and 30 minutes on account of and by reason of the said train breaking in two,

and that the said break in two and delay of 1 hour and 30 minutes was the result of a cause not known to the defendant or its officers, agents, or any of them in charge of said train and of such employees at the time said train and employees left Tucson, the terminal, from which it started at — a. m. on said date; and that the same was caused by an unavoidable accident and one that could not have been foreseen by this defendant or any of its officers, agents, or employees; all of which and the time of delay was promptly reported to the Interstate Commerce Commission by the defendant herein, together with the defendant's claim of exemption for the 1 hour and 30 minutes' delay at Esmond as aforesaid.

Wherefore defendant prays that the delay of 1 hour and 30 minutes, by reason of the unavoidable accident as aforesaid, be allowed defendant, and that the provisions of this act shall not apply to this defendant in the alleged causes of action contained in counts 7, 8, 9, 10, 11, and 12 set forth in plaintiff's complaint, and that the defendant go hence without day, together with its costs.

To this answer the Government demurred (Rec., pp. 23, 24), assigning five grounds of demurrer, which are set forth in the assignments of error (Rec., pp. 34-37). While the answer was also demurrable on the ground that it was indefinite and uncertain as to the cause of the break in two, this was not relied upon in the lower court; therefore it will not be urged in this court.

ASSIGNMENTS OF ERROR.

1. The said District Court of the United States for the District of Arizona erred in overruling the demurrer of the United States of America to the answer of the said Southern Pacific Co. to the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action set forth in the petition or complaint herein for the reason that it does not appear from the said answer that the breaking in two of the train mentioned in said answer at Esmond and the delay thereto was not known to the said Southern Pacific Co. or its officer or agent in charge of the employees mentioned in said causes of action at the time they left a terminal.

2. The said District Court erred in overruling the said demurrer for the reason that it does not appear from said answer that the breaking in two of said train at Esmond prevented the said Southern Pacific Co. from relieving the employee mentioned in any of said causes of action before he had been continuously on duty more than 16 hours.

3. The said District Court erred in overruling said demurrer for the reason that it does not appear from the said answer that the failure of the said Southern Pacific Co. to relieve the employee named in any of said causes of action before he had been continuously on duty more than 16 hours was due to a casualty or unavoidable accident or the act of God; or that the failure so to relieve such employee was the result of a cause not known to said Southern Pacific Co. or its officer or agent in charge of

such employee at the time he left a terminal and which could not have been foreseen.

4. The said District Court erred in overruling said demurrer for the reason that it does not appear from the said answer that the said Southern Pacific Co. made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than 16 hours.

5. The said District Court erred in overruling said demurrer for the reason that the matters set forth therein as a defense to said causes of action are insufficient in law to constitute a defense to any of said causes of action.

6. The said District Court erred in rendering judgment in favor of said Southern Pacific Co. and against the said United States of America upon the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action set forth in said petition or complaint, for the reasons stated in the foregoing assignments of error.

QUESTIONS INVOLVED.

1. Does a delay to a train by reason of some unavoidable accident automatically extend to the carrier a license to permit its employees thereon to continue the operation of such train to the end of their usual or customary run?
2. Where a carrier fails to relieve an employee after he has been in continuous service 16 hours, can such failure be justified by merely

showing that somewhere on its run the train in question was delayed by one of the causes set forth in the proviso of section 3 of the hours-of-service act?

3. Do the provisions of the hours-of-service act authorize a carrier to require its employees in train service to remain continuously on duty for 16 hours and for so much longer as they may possibly have been delayed en route by reason of some unavoidable accident?
4. Do the words "a terminal," as used in the proviso of section 3 of the hours-of-service act, mean—

(a) Only *the* terminal from which an employee in question starts on his trip? or

(b) *Any* terminal through which such employee may pass while en route to the end of his usual or customary run?

ARGUMENT.

I, II, III.

The mere delay to a train on account of some unavoidable accident will not license the carrier thereafter to disregard or ignore the mandatory provisions of section 2 of the hours-of-service act.

"The delay," as used in the proviso of section 3 of the hours-of-service act, does not refer to a delay that some particular train may have suffered, but has reference to the delay of the carrier in complying with the mandatory provisions of section 2 of the act.

The delay to a train of 1 hour and 30 minutes on account of an unavoidable accident does not, of itself, authorize the carrier to permit its employees thereon to remain continuously on duty 17 hours and 30 minutes.

As all the above questions are closely related, they will be considered under one general discussion of the limitations placed upon the mandatory provisions of section 2 of the act by the proviso of section 3.

Section 2 of the act provides:

*That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty. * * **

The italicized portion indicates that provision of the act the construction of which is involved in this case.

The only limitation placed upon these mandatory provisions of section 2 is to be found in the

proviso of section 3, upon which the carrier relies as an excuse or justification for its failure to relieve certain employees after 16 hours' continuous service.

This proviso reads as follows:

That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.

Reading together the mandatory provision of section 2 and this proviso, it is evident that " whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours *he shall be relieved* " unless the failure of the carrier so to relieve him is due to one of the causes named in the proviso.

It seems to be the theory of the carrier that whenever a train is delayed somewhere on its run by an unavoidable accident the employees thereon are automatically removed from within the provisions of the act for a period of 16 hours plus the time lost by reason of such unavoidable detention. In other words, the carrier contends that the proviso should be so construed as to mean that an unavoidable delay to a train operates as a license to prolong the hours of service of its employees thereon beyond the period prescribed by Congress.

So to hold would be merely to limit the phrase “ *in any casualty* ” to its narrow *interpretation* and justify a carrier in requiring service of its employees in excess of 16 hours, *even in those cases where such employees could be very easily relieved before being on duty longer than the statutory period.*

“ *The provisions of this act shall not apply in any case of casualty, * * ** ” should be construed to mean that a carrier will be excused for requiring excess service of its trainmen *and for its failure to relieve them after they have been on duty 16 hours only in those cases where a casualty or the like actually prevents a compliance with the mandatory provisions of section 2.*

It was said in *United States v. Farenholt* (206 U. S., 226): “ It seems that interpretation is the reading of a statute according to its letter, while construction is the reading of a statute according to its spirit and intent; ” and in *Williams v. Gaylord* (186 U. S., 157) the court said: “ The very essence of construction is the extension of the meaning of a statute beyond its letter. ”

To illustrate the defendant’s *interpretation* and the Government’s *construction* of the act:

A train leaves W destined for Z, the run of which ordinarily consumes 15 hours and 30 minutes. At X, about 1 mile from W, it is delayed 1 hour and 30 minutes on account of an unavoidable accident. Before the cause of this unavoidable detention has

been removed the carrier knows that the employees so delayed, if permitted to operate their train to Z, will be on duty approximately 17 hours. But in spite of this knowledge, in spite of the fact that such employees could be relieved before being on duty over 16 hours, they are required to operate their train to Z, having been in continuous service 17 hours.

The Government contends that such excess service is not licensed by the unavoidable delay to the train after leaving W ; that an unavoidable accident has but the effect of relieving the carrier from the penalty only in those instances where such accident has a direct, or causal, connection with the failure of the carrier to relieve the employees at the expiration of 16 hours.

The theory of the carrier is that because " the provisions of this act shall not apply in any case of * * * unavoidable accident " it is not required to make the slightest effort to prevent excess service on the part of its employees.

On the assumption that such a construction of the act is the proper one, the fact is lost sight of that one of " the provisions of this act " is the mandatory requirement that an employee " shall be relieved " after 16 hours' continuous service.

We do not believe there is anything in the act, either expressed or implied, that could in any manner be construed to bear out the contentions of the carrier in the present case. It is a departure even from a literal reading of the proviso ; and in spirit

and intent it is but an ingenious effort to evade the requirements of the statute.

The absurdity of the carrier's construction can be no better illustrated than by the following:

A train is en route from W to Z, which ordinarily consumes about 14 hours. No unavoidable accidents are encountered before reaching X, a station midway between W and Z, but on account of heavy traffic it does not reach X until the crew have been on duty 10 hours. It is known for some time that they can not reach Z and be relieved within 16 hours; therefore, in order to comply with the mandatory provisions of section 2, arrangements are made to relieve the crew at Y, at which point it is calculated they will arrive approximately within 16 hours from the time they went on duty at W. But after leaving X the train is delayed one hour by some unavoidable accident, and the efforts theretofore made to relieve the crew at Y are abandoned, for, as the carrier will contend, it is under no legal obligations to relieve the employees "*in any case of casualty or unavoidable accident.*"

The above clearly presents a situation that might be warranted by a literal interpretation of the proviso. While the pleadings in the instant case ask credit only for the time lost by reason of an unavoidable accident, this, we believe, is a greater departure from a literal reading of that proviso than would be a construction of the same authorizing 24 hours' continuous service following an unavoidable delay of 2 or 3 hours.

In considering what “provisions of this act shall not apply in any case of casualty or unavoidable accident” we must either eliminate or fully consider that provision requiring that an employee “*shall be relieved*” after 16 hours’ continuous service. But can we eliminate that provision from our consideration without holding that “the provisions of this act” should be construed to mean only “*some of the provisions of this act*”? If so, then we are confronted with the question of what provisions shall not apply in cases of unavoidable accidents. So, if we consider that mandatory provision, if it is to have any weight in arriving at a construction that will carry out the intent of Congress, do we strain a point in saying that in order to excuse a carrier its failure to relieve an employee after he has performed the statutory period of service must be the result of an unavoidable accident or the like?

In the case now under consideration the train was delayed by an unavoidable accident, which undoubtedly jeopardized the lives of its crew; but instead of thereafter providing relief, which for all we know might have been done, the carrier required the same crew to continue on duty for 17 hours and 30 minutes—1 hour and 30 minutes in excess of the period fixed by Congress beyond which a trainman could not work with safety to himself and to those depending upon his alertness and vigilance for protection.

If we carry the contention of the carrier to its logical conclusions, it means that under no circumstances is it required to prevent excess service on the part of passenger and certain other crews having regular scheduled runs. If such a train is not delayed by reason of some unavoidable accident there will be *no necessity* of providing a relief crew, but in the event that it does encounter an unavoidable delay there is *no legal obligation* to prevent excess service of the crew.

Looking at it in another way; the contention of the carrier is that because it could not prevent the unavoidable delay to a certain train it was not required to make any effort to prevent excess service of its crew. *In other words, because it could not prevent its employees thereon being endangered once it was not required to provide relief and thus remove the cause of future hazard, not only to those same employees but to employees and passengers of other trains.*

This law was passed to meet a condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employees themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its *purposes* may be effected. (*United States v. Kansas City Southern Railway Company*, 8th C. C. A.; 202 Fed. Rep., 828, and cases cited.)

This liberality of construction applies to that section of the act defining or creating the offense, but is of no avail to the carrier in its attempt to bring itself within the proviso. As was said by Mr. Justice Story in *United States v. Dickson* (15 Pet., 141, 165; 16 L. Ed., 689):

The general rule of law which has ordinarily prevailed and become consecrated, almost, as a maxim in the interpretation of statutes, is that where the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its meaning. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof.

The answer does not disclose the least casual connection between the break in two of the train and the service required of the crew. In fact, taken most strongly against the pleader, the answer shows nothing more than wanton neglect in permitting the crew to remain on duty over 16 hours. Had the so-called unavoidable accident prevented the carrier from relieving the crew before they had been continuously on duty more than 16 hours it should have been pleaded; and if such accident actually necessitated the employment of this crew for the full period of 17 hours and 30 minutes, such fact should also have been pleaded. But for

all we know, the unavoidable accident might have occurred immediately after leaving the initial terminal, in which event the carrier had sufficient time to provide relief and prevent excess service of the crew. Having pleaded that such unavoidable accident was unknown to the carrier "at the time said train and employees left Tuscon, *the terminal*," has it thereby set up facts sufficient to bring itself clearly within the proviso? In order properly to plead its affirmative defense, the carrier must show, not merely the delay to a train by reason of some unavoidable accident, but it must also show that *all of the service* required of the crew so delayed was necessitated by such accident, and that the same was unknown to the carrier at the time the employees in question left "*a terminal*."

A carrier should not be excused for wholly disregarding the mandatory provisions of the act with respect to certain employees, even though their train may have been delayed by an accident clearly unavoidable. There may be times when a carrier, by reason of some unavoidable accident, is prevented from relieving an employee before he has been on duty a little over 16 hours, but we do not believe that such excusable failure to prevent some excess service is any justification for the failure of the carrier thereafter to make some efforts to reduce to a minimum such excess service. To illustrate our meaning:

A train is en route from W to Z. When leaving Y the crew have been in continuous service nine

hours, but shortly thereafter are delayed seven hours by some unavoidable accident, the place of delay being where no relief can immediately be furnished. The crew remain on duty, assisting in removing the cause of the delay, but by the time this is done they have been in continuous service 16 hours. From the scene of the accident the train proceeds to Z, a run of approximately six hours. Long before the wreck was cleared the officials knew that this train could not reach Z within 16 hours from the time it left W, but in spite of this knowledge the crew are required to operate their train to Z, their period of service being 22 hours.

Now, this train was delayed by an accident clearly unavoidable, preventing the carrier from relieving the employees thereon before they have been in continuous service 16 hours, although it could have relieved them before they were on duty 17 hours. But the carrier attempts to justify its neglect to prevent 22 hours' service by its inability to prevent either the unavoidable accident or 17 hours' service of the crew thereby delayed. This illustration clearly portrays the attitude of the carrier in the instant case, even if we assume that the break-in-two pleaded as an excuse had the least causal connection with some of the excess service of the employees in question.

We believe that "*whenever any such employee*
** * * shall have been continuously on duty for*
*16 hours he shall be relieved * * **" unless the

failure to relieve him before he has finished his trip is due to an unavoidable accident or the like, and not due to the carrier's negligence in failing to take even ordinary precautions to provide relief, particularly when it is apparent that in the absence of such the employee in question will be on duty over 16 hours.

It may be argued that it would be a hardship on the carrier to be required to take such precautions to provide relief and thus give to its employees and travelers that protection which we believe the law demands. This argument is a dangerous one and should not be heeded. The question of hardship is a dual one. There may be instances where the sending out of a relief crew might possibly be a hardship on the carrier from a financial point of view; but if we consider this phase of the question we must of necessity and reason consider the question of hardship from the point of view of those employees and travelers whose lives would be jeopardized by some act of omission or commission on the part of some trainman who is both mentally and physically impaired by being in continuous service over 16 hours.

In the case now under consideration the unavoidable delay to the train did not prevent the carrier's obedience to the mandatory provisions of section 2; at least, it was not so pleaded. Therefore, we may assume there was not the least causal connection between such unavoidable accident and

the failure of the carrier to relieve its employees before they had been continuously on duty 17 hours and 30 minutes.

In this connection we desire to call attention to the reasoning of the court in the case of *Newport News & Mississippi Valley Co. v. United States* (61 Fed. Rep., 488). Lurton, then circuit judge, in delivering the opinion of the court, said:

The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character, described as "other accidental causes"; that the use of the disjunctive "or" after "storm" indicates a purpose to except detentions due to causes not the act of God, and described by the term "accidental"; that this construction finds support in section 4388, which imposes the penalty only upon such carriers as "knowingly and willfully" fail to comply with the requirements.

This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm therefore he should be excused.

It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or miti-

gated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable by reason of a storm to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could, by due care, have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show not only the fact of a storm, but that with due care he was "prevented," as an avoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes." * * *

An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause, the unlawful confinement and unreasonable detention but an effect of that negligence.

This last case involved violations of the 28-hour law, in which the carrier is only required to exercise ordinary care in its efforts to comply with the provisions of that act; but under the hours of service act it should not be excused for exercising only ordinary care. The carrier should be held at least to a high, if not the highest, degree of care, and only the exercise of such care in its endeavor to relieve an employee before he has been on duty over 16 hours should excuse such excess service.

The fact that a carrier exercised the required care to prevent an accident delaying a train does not relieve it from thereafter exercising some care to avoid the consequences of such unavoidable delay. But under no circumstances do we believe that an *excusable* delay to a train is a license for an *inexcusable* delay in relieving the employees thereon after 16 hours' continuous service.

This so-called "license" phase of the proviso was considered in a case against the Southern Railway Co., western district of North Carolina, decided October 30, 1913 (not yet reported). In that case it was the contention of the carrier that it was entitled to operate a train 16 hours and for so much longer as it might be delayed by one of the causes named in the proviso, and without relieving the employees thereon. On this phase of the question the trial court said:

On that I rule that the occurrence of an accident or delay by the act of God or any case of casualty or unavoidable accident while the train is in course of transit from one terminal point to another does not mean that the entire act is suspended as to that train. To hold that the entire act would be suspended as to that train would be to hold that the 16 hours' limit did not apply to any train between terminals during the progress of whose transit between terminals any delay occurred from the exempting causes named in the statute. The delay might be any number of hours, from 5 to

10, and I hold that the statute does not mean that as to that train the operative period of service is extended from 16 to 21 or 26 hours, according as some delay from the exempting causes may occur whilst the train is in transit. I construe the statute to mean that the hours of service shall be extended in such cases only so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew could be relieved or be allowed to take the rest required by the statute.

Another case involving the same question is that of *United States v. Oregon-Washington Railroad & Navigation Company* (No. 5943), district of Oregon, decided June 4, 1914. The answer of the defendant alleged that the train in question was delayed by certain causes coming within the proviso, "and that by reason of said delays and not otherwise the defendant required said employees to remain on duty 1 hour and 15 minutes in excess of 16 hours, and but for said delays said employees would not have remained on duty any amount of time in excess of 16 hours and would have completed the trip from La Grande to Umatilla in much less than 16 hours' continuous run." The answer also alleged that the causes of the delay were not known to the carrier or its officer or agent in charge of said employees at the time such em-

ployees left " the La Grande terminus " (the initial terminal for that crew).

To this answer the Government demurred and assigned the following grounds of demurrer:

1. It does not appear from said answer that the causes of the alleged delays between La Grande and Umatilla were not known to the defendant or its officer or agent in charge of the employee named in each cause of action of plaintiff's petition at the time he left a terminal.

2. It does not appear from said answer that the alleged delays between La Grande and Umatilla prevented defendant from relieving the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

3. It does not appear from said answer that the failure of defendant to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours was due to a casualty or unavoidable accident or the act of God; or that the failure to so relieve such employee was the result of a cause not known to the defendant or its officer or agent in charge of such employee at the time he left a terminal and which could not have been foreseen.

4. It does not appear from said answer that defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

In sustaining the Government's demurrer the following remarks of District Judge Bean are pertinent:

In this case the judgment of the court is that this answer does not state a defense. This service act prohibits the company from permitting its employees to remain in service more than sixteen consecutive hours, unless it shall be due to casualty, unavoidable accident, or the act of God, or when the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the employee left a terminal, and which could not have been foreseen.

So I take it the purpose of this statute is to prohibit a railway company from allowing or permitting its employees to remain in consecutive service more than sixteen hours unless the reason for the delay comes within the particular exceptions of the statute, and therefore it seems to me that where a railway company's train is delayed and the sixteen hours expire, it is the duty of the company to relieve its employees if it can do so by sidetracking its train, if there is a station where it can be done, and that it cannot use the delay as a part of the time necessary to reach one of its terminals; otherwise it might continue the service for an indefinite length of time. So I take it this answer is not sufficient, and the demurrer should be sustained.

In the case of *United States v. Baltimore & Ohio Railroad Company*, No. 1710, Southern District of Ohio, decided December 17, 1913, the same question

was raised. In his charge to the jury District Judge Sater said:

The defendant's position, if I comprehend it correctly, is this: That where a delay occurs that is excusable under the law the train crew may then go forward and complete the journey; go forward until it reaches its destination, although in so doing it may run over the 16-hour period; that the common carrier is not then required to relieve the crew, even if it may do so; that the common carrier has the right to have them complete the journey where a delay has occurred which is excusable, even though the time to complete the journey is in excess of the 16-hour period. Do I state your position correctly?

Mr. DURBAN. Yes, your honor, except that we claim that the statute by its terms says that in that case the act shall not apply.

Mr. KING. And provided that the period of the excusable delay equals the period of the excess or the overtime; that is admitted in this case.

The COURT. That is the position of the defense as their interpretation of the law.

The Government takes a different view. Its view is that even though a delay excusable in law has occurred, after it is over and the train proceeds the carrier is not excused from working the men or permitting them to work beyond the 16-hour period, or further beyond the 16-hour period than is necessary to relieve them.

This is the Government's position, if I understand it rightly, viz, that men may not be held to their work or permitted to continue it after the 16-hour period a longer time than is necessary to relieve them.

If I understand its position, it is this: Suppose a crew starts on a run that will take 12 hours. It is out 2 hours. A delay occurs which is excusable in law. Suppose it is held there 9 hours; they would have 10 hours more of service if they should complete the whole trip. If they remained on duty to the end of the trip, they would put in 21 hours of work. Now, if I understand the defendant's position, it is that they would have the right to go forward and complete that trip although it might take them 21 hours. The Government's position is that the law does not mean that. The defendant's position is that the law would not apply to that kind of a case. The Government's position is that it does apply and that it does not intend that the men shall work beyond the 16 hours, if they can be reasonably relieved, and, if they reach a point at which they may be thus relieved, it is then the duty of the carrier to relieve them. We have not had this question decided by the higher courts. I have concluded that the position of the Government is correct, and that what the law means is that where a delay has occurred, the crew may go forward operating the train, but that it can not be held in service without violat-

ing the law (if the 16-hour period has expired), if a suitable stopping place should be reached at which it may be relieved; and that if such a place is reached and the crew is not relieved, that then there is a violation of the law and the carrier becomes responsible; that it is a carrier's duty to provide in such emergencies at suitable places for persons to relieve men who have served the full statutory period or more on account of some delay which may have arisen.

It will be urged that these views of the several courts, including that of the trial court in the case at bar, are not in harmony with, but antagonistic to, certain administrative rulings of the Interstate Commerce Commission; but we believe that a glance at these rulings will be sufficient to convince to the contrary.

On March 16, 1908, the Commission made the following ruling:

287 (i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point.

The " occurrences " that " could not be guarded against " by the exercise of the proper precaution on the part of the carrier include those instances where an unavoidable accident is the direct cause

of an employee being on duty over 16 hours, and also where, after he has been on duty 16 hours, there is no "lack of precaution on the part of the carrier" in thereafter providing relief.

In conformity with the Commission's view, that, in order to prevent excessive hours of service, the carrier would send out a relief crew, unless prevented by some unavoidable accident or the like, in which event the crew so delayed might proceed to the end of its run, the operation of its train being in charge of the relief crew, the Commission, on May 5, 1908, made the following ruling:

74. Hours-of-service law. Employees dead-heading on passenger trains or freight trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty," as that phrase is used in the act regulating the hours of labor.

The law should not be so harshly construed as to compel a carrier at the exact minute the 16-hour period expires immediately to stop a train at whatever point it may happen to be and probably block its main line until the crew has had 10 hours' rest or until a relief crew arrives. Nor has the Commission, either in its construction or administration of the law, endeavored to place such a hardship on the carrier. But having in mind possible instances where crews can not be relieved after being delayed by reason of unavoidable accidents, regardless of

the precautions thereafter taken by the carrier to provide relief, the Commission made the following administrative ruling:

May 25, 1908. Ruling 88.

(b) Section 3 of the law provides that—

“The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.”

Any employee *so delayed* may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (See rule 287.) (Italics ours.)

It follows, therefore, that under these rulings an employee may be permitted to operate his train to the end of the run in those instances where he is delayed by “such occurrences as could not be guarded against” and when through “no neglect or lack of precaution on the part of the carrier” he can not be relieved.

Bearing in mind the purpose of the law, together with the fact that “every overworked man presents a distinct danger” (*M., K. & T. v. U. S.*, 231 U. S., 112), it is not an unreasonable construction of the same to hold that whenever an employee in train service has been continuously on duty for 16 hours he shall be relieved, not merely from that particular kind of service, but from any kind of

work, unless the carrier's failure to relieve such employee is due to one of the causes set forth in the proviso. We do not believe it is sufficient for the carrier merely to say that a train was delayed by some unavoidable accident, without showing the length of the delay or the connection between such delay and the failure to relieve the employee at the expiration of 16 hours.

It is respectfully submitted that any unavoidable accident is not, standing alone, a license to a carrier to disregard that provision of section 2 providing that an employee *shall be relieved* after 16 hours of continuous service.

The carrier will, of course, contend that the words "so delayed" refer, not to the delay in relieving an employee after he has been on duty 16 hours, but have reference to *any delay* his train may have encountered by reason of some unforeseen cause after leaving the initial terminal; and therefore unforeseen delays to a train will license any *preventable* or *inexcusable* delay in relieving the employees thereon.

As the words "so delayed" have direct reference to the word "delay," as used in the proviso, which has already been fully discussed, we do not believe it necessary to discuss any further the carrier's ingenious construction of the hours-of-service act and the rulings of the Interstate Commerce Commission.

In support of its contention that all its acts, avoidable and inexcusable, are pardoned and con-

done when committed subsequent to an unavoidable accident, reference may be made by the carrier to the case of *United States v. Atchison, Topeka & Santa Fe Railway Co.* (212 Fed. Rep., 1000). But we can not entirely reconcile this case with such contention.

In the first part of the decision in the Santa Fe case, much stress is laid upon the construction of the proviso taken in connection with the administrative rulings of the Commission. At the bottom of page 1006, we find this sentence:

In other words, the proviso takes the case out of the operation of the statute in every instance except those in which the officers or agent in charge of the employee *knew*, or could have foreseen, the existence of the cause of the delay at the time such employee left the terminal or starting point.

In other words, if we may judge by the above, the carrier would only be liable for those deliberate and willful acts of its officers and agents; and, therefore, any unforeseen delay to a train automatically removes the employees thereon from within the provisions of the law. But if this is the correct construction of the act, why the necessity of placing reliance upon the Commission's rulings? And having placed reliance upon such rulings, why lose sight of the fact that the "instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers?"

However, later in the decision (p. 1008), we find this construction of the act somewhat modified. The train there involved was delayed by an accident which was admitted to have been unavoidable and unforeseen at the time the employees thereon left their terminal. If we apply the construction of the act as expressed on page 1006 to this train crew, their case would be taken out of the statute and they might operate their train to the end of their usual or customary run. But in this instance, such unavoidable and unforeseen delay does not remove the case from within the statute, for the reason that part of the time consumed in reaching the final terminal was due to hauling a car manifestly in violation of the safety-appliance act.

We have no fault to find with this view of the court; in fact, we are heartily in accord with it. But we believe that if the negligence of the carrier in hauling a car in a manner prohibited by the safety-appliance act does not take the case out of the operation of the hours-of-service act, then negligence in another form, to wit, negligence in making no effort to relieve an employee at the end of 16 hours' service, should not remove that case from within the provisions of the act.

The criticism we have of this decision is the same we have of the carrier's contention—that "the delay," as used in the proviso, does not refer to the delay which some particular train may encounter, and, therefore, excuse excess service of the employees thereon; for it must be remembered that

one of the provisions of the act which does not apply in any case of casualty, etc., is the provision that "whenever any such employee * * * shall have been continuously on duty for 16 hours he shall be relieved." While we have the greatest respect for the court rendering the decision in this Santa Fe case, we can neither agree with it nor with the carrier in the instant case that it is unnecessary to show any causal connection between a delay to a train on account of one of the causes enumerated in the proviso and "the delay" of the carrier in relieving the employees "so delayed" after they have been continuously on duty 16 hours.

IV, V.

"A terminal," as used in the proviso of section 3 of the hours-of-service act, does not mean, with reference to a certain employee, only THE terminal from which he starts on his trip; it includes both the initial terminal and ANY OTHER terminal that such employee may arrive at and leave while en route to his final terminal, or end of his usual or customary run.

In the Fifty-ninth Congress, first session, April 26, 1906, Mr. Esch introduced H. R. bill 18671, which was referred to the Committee on Interstate and Foreign Commerce. The committee reported the bill back to the House on May 31, 1906, with certain amendments.

The original proviso in section 4 read as follows:

Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable or unforeseen train accident or act of God occurring after such employee

has left *a terminal*, he is prevented from reaching *his terminal* within the time specified in section one of this act.

The committee recommended certain amendments, so that the proviso would read as follows:

Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable accident or act of God not known to the carrier or its agent in charge of such employee at the time he left *a terminal*, he is prevented from reaching *his terminal* within the time specified in section one of this act.

On May 4, 1906, at the same session of Congress, Mr. Esch introduced H. R. bill 18961, which was also referred to the Committee on Interstate and Foreign Commerce.

That bill made it unlawful to permit an employee "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal*."

On February 20, 1906, Mr. Bede introduced H. R. bill 25757, which made it unlawful to permit an employee to remain on duty more than 16 consecutive hours, "except when by casualty occurring after such employee has started on his trip or by unknown casualty occurring before he started on his trip he is prevented from reaching *his terminal*."

On March 15, 1906, Mr. La Follette introduced Senate bill No. 5133, which is the present hours-of-

service act. This bill gave to the Interstate Commerce Commission full power to prescribe the hours of service of employees connected with train movements. It was referred to the Committee on Education and Labor, and reported by Mr. Dooliver, with an amendment, which fixed the hours of service instead of leaving it to the commission, and which made it unlawful to require service of an employee beyond 16 consecutive hours, "except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal*."

On June 27, 1906, this bill was taken up for consideration and Senator Gallinger proposed a certain amendment, which made the proviso read as follows:

except when by unavoidable accident, or act of God, or resulting from a cause not known to the carrier or its agent in charge of such employee at the time he left *the terminal*,

to which amendment Senator La Follette proposed to add the following:

or by unknown casualty occurring before he started on his trip.

Senator Foraker proposed an amendment, which if adopted would have made the proviso read as follows:

except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal*.

On January 8, 1907, Senator Dolliver offered an amendment to Senate bill 5133, which eliminated entirely the proviso and made the provisions of the act absolute.

On the same day Senator Gallinger proposed to add the following section to this bill:

SEC. 5. That nothing in this act shall be construed to prohibit or in any way interfere with the employment, with their consent, of men whose hours of labor are affected herein, upon runs, single or turn, which, in the reasonable judgment of the officers of the respective railroads and of the men so employed, can be completed, in the ordinary course of business of the carrier, within sixteen hours.

On January 9, 1907, Senator Brandegee proposed an amendment making it unlawful for a carrier to require more than 16 consecutive hours' service of an employee, "except when on account of an emergency, which by reasonable care on the part of such carrier, its officers or agents, could not have been avoided, he is prevented from reaching *his terminal* * * *."

On the same day Senator Scott proposed the following amendment:

This act shall not apply to cases where a continuance on duty beyond sixteen hours will enable an employee to reach *a terminal*: *Provided*, That at the expiration of sixteen hours he is within twenty miles of such terminal.

On January 10, 1907, Senator McCumber offered the following amendment to follow the word "terminal" in the proposed Gallinger amendment of June 27:

or except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal.

Senate bill 5133, as it passed the Senate on January 10, 1907, made it unlawful "to require or permit any employee engaged in or connected with the movement of any train carrying interstate or foreign freight or passengers to remain on duty more than 16 consecutive hours, *except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal.*"

After passing the Senate, this bill, on January 11, 1907, was referred to the Interstate and Foreign Commerce Committee of the House, and on February 16, 1907, was reported, with an amendment, and referred to the House Calendar. The proviso then read as follows:

Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor

where the delay was the result of a cause not known to the carrier or its agent in charge of such employee at the time said employee left *a terminal*, and which could not have been foreseen with the exercise of ordinary prudence. (All italics ours.)

The conference committee, in its report on March 1, 1907, agreed upon several amendments, but left undisturbed and adopted the House amendment striking out the words, "his terminal."

At no time thereafter was the slightest effort made practically to stultify the act by permitting an employee, in cases of unavoidable accidents, to operate his train to the end of his usual or customary run, or, in other words, "his terminal."

CONCLUSION.

From the record in this case it clearly appears:

That the carrier (defendant in error) required certain employees in train service to be and remain continuously on duty more than 16 hours.

That while the carrier relied upon an unavoidable accident as a legal excuse for such service, it did not connect such accident with its failure to relieve the employees before they had been in continuous service more than 16 hours.

That the alleged unavoidable accident was known to the carrier and its officers and agents in charge of such employees at the time they left "a terminal."

Wherefore it is respectfully submitted that the judgment of the lower court should be set aside and the case remanded with instructions to sustain the Government's demurrer to the answer of the carrier to causes of action 7 to 12, inclusive.

THOMAS A. FLYNN,
United States Attorney.

SAMUEL L. PATTEE,
Assistant United States Attorney.

MONROE C. LIST,
Special Assistant United States Attorney.



8
No. 2443:

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

VS.

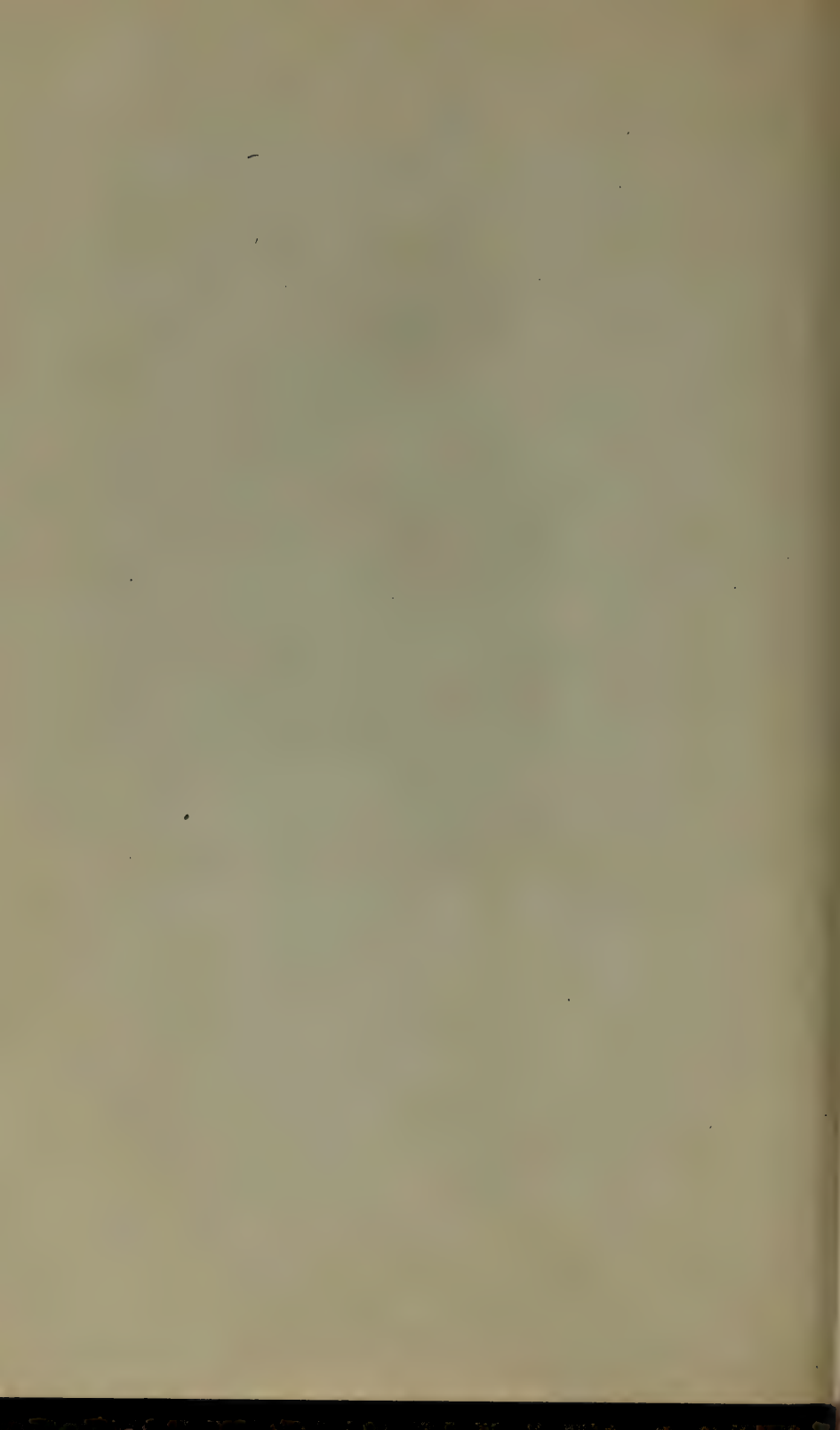
THE SOUTHERN PACIFIC COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR:

FRANCIS M. HARTMAN,
CHAS. J. HEGGERTY,
KNIGHT & HEGGERTY,
Attorneys for Defendant in Error.

Filed

OCT 29 1914



No. 2443:

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

VS.

THE SOUTHERN PACIFIC COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR:

STATEMENT OF THE CASE:

The United States brought suit in the District Court for the Arizona District to recover from the Southern Pacific Company penalties under the Act of March 4, 1907 (34 Stat. L. p. 1415), known as the "Hours of Service Act;" the Complaint was in *twelve* Counts; the *first six* Counts (Tr. p. 1-7) related to the hours of service on *one* train, and the

last six (Tr. p. 7-14) Counts (the present case), to the hours of service *on another train*.

These *last six* counts of the *Complaint* (Tr. p. 7-14) are the *only ones* involved on this Writ of Error; these *last six* Counts are identical (except as to names of the trainmen), and charge that on train Extra, Engine No. 2794, leaving Tucson at 5:20 A. M. December 22, 1912, with Bowie as its destination, the train crew were permitted to remain on duty from 5:20 A. M. to 10:50 P. M. a period of 17 hours and 30 minutes (Tr. p. 7-9).

The *Answer* admits that the six persons named constituted the train crew of this train between Tucson and Bowie, that they went on duty at 5:20 A. M. and were finally relieved at 10:50 P. M. (Tr. p. 21).

As an affirmative Answer and Defense to the *last six* Counts, the Defendant set up in its *Answer* the following: (Tr. p. 21, 22) :—

“The defendant alleges, by way of relief and exoneration from the provisions of the statute in plaintiff’s said complaint set out, that the said extra train No. 2794 was delayed and detained en route at a station called Esmond, in the county of Pima, State of Arizona, while en route on the day and date named in Plaintiff’s complaint for the period of one hour and thirty minutes on account of and by reason of the said train breaking-in-two, and that the said break-in-two and delay of one hour and thirty

minutes was the result of a cause not known to the defendant or its officers, agents, or any of them in charge of said train and of such employees at the time said train and employees left Tucson, the terminal, from which it started at——A. M., on said date; and that the same was caused by an unavoidable accident and one that could not have been foreseen by this defendant or any of its officers, agents or employees; all of which and the time of delay was promptly reported to the Interstate Commerce Commission by the defendant herein, together with the defendant's claim of exemption for the one hour and thirty minutes delay at Esmond as aforesaid."

To this *Affirmative* Defense contained in the Answer of Defendant in Error, the Government demurred upon the following grounds (Tr. p. 23, 24) :—

"Now comes the above-named plaintiff, by its attorney, and demurs to that part of the defendant's answer filed herein relating to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action of plaintiff's petition, and assigns the following grounds of demurrer:

1. It does not appear that the breaking-in-two of the train at Esmond, and the delay thereto, was not known to the defendant, or its officer or agent in charge of said employees at the time they left a terminal.

2. It does not appear that the breaking-in-two of the train at Esmond prevented the defendant from relieving the employee named in

any of said causes of action before he had been continuously on duty more than sixteen hours.

3. It does not appear that the failure of the defendant to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours was due to a casualty of unavoidable accident or the act of God; or that the failure to so relieve such employee was the result of a cause not known to the defendant or its officer or agent in charge of such employee at the time he left a terminal and which could not have been foreseen.

4. It does not appear that the defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

5. The facts pleaded do not constitute a defense to any of said causes of action."

The Court *overruled* this Demurrer, and made the following Order (Tr. p. 26) overruling Demurrer, viz:—

"On this day this cause came on for hearing on the demurrer of the plaintiff to the answer of the defendant to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action set forth in the complaint, and said demurrer was thereupon argued by M. C. List, Esquire, on behalf of the Plaintiff, and by Francis M. Hartman, Esquire, on behalf of the defendant and was submitted to the Court for decision, and thereupon it was ordered that said demurrer be overruled, to

which order and ruling of the court, the plaintiff by its counsel, then and there in open court excepted. The plaintiff declined to amend its complaint with respect to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action set forth therein, and declined to plead further with respect thereto, but elected to stand upon the pleadings, and thereupon the cause was called for trial upon the 1st, 2d, 3d, 4th, 5th, and 6th causes of action set forth in the complaint."

A jury was selected to try *the other six first* Counts upon which *a directed* verdict was rendered in favor of Plaintiff in Error; thereupon the Court rendered its *Judgment* as follows (Tr. p. 32, 33) :—

"And it is further ORDERED, ADJUDGED AND DECREED, that the said plaintiff take nothing by the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action in its complaint, and that as to each and all those causes of action the defendant go hence without day."

The Government conceded (Brief, p. 3) that this *Affirmative* Answer is a sufficient defense and brought the case under the *proviso* in Section 3 of the Act, *unless* the Defendant, as a matter of strict law, could not continue the train crew in service and on duty for the additional 1 hour and 30 minutes required for the train to reach *its other terminal*, Bowie, where the crew was finally relieved.

The period of *service* was 17 hours and 30 minutes; the *delay* was 1 hour and 30 minutes.

Throughout this Brief the *Italics*, in nearly all instances *are ours*.

ARGUMENT:

I

The learned Counsel for the Government, on pages 5 and 6 of their "Brief and Argument of Plaintiff in Error", state the following, as the *questions* involved on this Writ of Error, viz:—

"QUESTIONS INVOLVED:

"1. Does a delay to a train by reason of some unavoidable accident automatically extend to the carrier a license to permit its employees thereon to continue the operation of such train to the end of their usual or customary run?

"2. Where a carrier fails to relieve an employee after he has been in continuous service 16 hours, can such failure be justified by merely showing that somewhere on its run the train in question was delayed by one of the causes set forth in the proviso of section 3 of the hours-of-service act?

"3. Do the provisions of the hours-of-service act authorize a carrier to require its employees in train service to remain continuously on duty for 16 hours and for so much longer as they may possibly have been delayed en route by reason of some unavoidable accident?

“4. Do the words “a terminal”, as used in the proviso of section 3, of the hours-of-service act, mean—

“(a) Only *the* terminal from which an employee in question starts on his trip? or

(b) *Any* terminal through which such employee may pass while enroute to the end of his usual or customary run?”

Therefore, it appears *conceded* before the Court that the Answer *sufficiently pleads* as a defense and excuse for this 1 hour and 30 minutes *overservice*, the following:—

(1) That this train *broke in two* after leaving its starting terminal Tucson, and while en route to its destination terminal Bowie, at a *station* called Esmond, and the train was *thereby delayed* 1 hour and 30 minutes.

(2)—That this breaking in two of the train was the “*result of a cause*” not known to the carrier, &c. “*at the time*” said employee “*left a terminal*,” Tucson, and which “*could not have been foreseen*”.

(3)—That this *delay* was caused by an “*unavoidable accident*”, and that the breaking in two of the train was an “*unavoidable accident*” (Tr. p. 21, 22).

Thus establishing as the *cause* of this *Overservice* of the train crew (a)—The *delay* of 1 hour and 30 minutes caused by the breaking in two of the train, not known, could not be foreseen &c; and (b)—*Unavoidable accident* resulting from this breaking in

two of the train, and *causing* the *overservice* of the train crew; and *both* expressly *exempting* the Defendant in Error under the proviso of Section 3 of this Act.

And on page 12 of their Brief, the learned Counsel for the Government expressly state:—

“In the case now under consideration *the train was delayed by an unavoidable accident*, which undoubtedly jeopardized the lives of its crew”—(Brief for *Plaintiff* in Error, p. 12).

But, the learned Counsel for the Government say: this *unavoidable accident* did not justify Defendant in Error *continuing* this train crew *in service* to its and their destination terminal, Bowie; and that they should have been relieved from duty at some *intervening* terminal.

FIRST:—The record does not show nor does it in any way appear that there was *any terminal* between *the place* of this *unavoidable accident* and Bowie, the destination terminal of this train *and* crew.

Consequently, the fact that this train crew was not relieved *before* the terminal at Bowie was reached, does not arise and is not before the Court upon the record on this Writ of Error from the judgment.

SECOND:—As a result, there is left for decision before this Court, only the single question: Was it

a violation of Sections 2 and 3 of this Act to continue in service this train crew to the destination terminal of both train and crew, Bowie, thus keeping the crew on duty 1 hour and 30 minutes in excess of the 16 hours specified in the Act?

This question and the other question raised by the Government as to the duty to relieve the train crew at an intervening terminal, if such there be, really involve the same consideration if both questions can reasonably be said to be before the Court for decision.

The learned Counsel for the Government, on page 28 of their Brief quote Ruling 88, May 25, 1908, by the *Interstate Commerce Commission*, on this subject, as follows:

“May 25, 1908. Ruling 88.

“(b) Section 3 of the law provides that—

“The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.”

“Any employee so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quote removes the application of the law to that trip.”

Senator *Bacon*, on the consideration of this Act by Congress, said:—

"All railroad men have their homes at or near their terminal, a place where their families are located, etc., where they are supposed to take their principal rest, and where lie-overs are permitted. Under the bill as it stands it is required that there should be ten hours' rest. As suggested in that communication, a railroad employé starting from his home, and making it may be a hard run to the other terminal, is very desirous to get back to his home and have his rest there; but he would be compelled under the bill to remain 10 hours at the other terminal, and in that way have that much less rest at his home terminal."

Congressional Record, 59th Congress, 2d Session, (Vol. 41, part 1,—p. 823.)

The Case of Atchison T. & S. F. Ry. Co vs. U. S. 177 Fed. 114, was decided by the Circuit Court of Appeals for the Seventh Circuit, Circuit Judge *Grosscup* rendering the opinion, and was *affirmed* by the *Supreme Court* in the 220 U. S. 37; on pages 118, 119, the Opinion states:—

"The contention of the Government is, that while in neither of the cases above mentioned was the operator required or permitted to remain on duty for more than nine hours in any twenty-four in the aggregate, such service, within the contemplation of the statute either is to be divided into 'two periods', separated by the intermission (for which the statute makes no provision), or is to be considered as 'one period', including the intermission, which would make it a period of twelve hours. But

manifestly, Congress did not intend that an intermission of three hours, in the middle of the day, should be computed as a part of the employee's service; for *the statute was enacted in view of the customs of the land*, and the customs of the land do not include such intermissions as a part of the working hours of employees. The position of the Government is therefore reduced to its contention respecting the word 'period',—that 'period' is a 'term', 'a cycle', something 'continuous' between a definite beginning and a definite end—whereby, invoking the canon of strict construction in criminal statutes, the period was a period of twelve hours, notwithstanding the intermission.

"We cannot concur in this view. The statute was passed *with custom as a background*. According to custom, nine hours' work unquestionably means nine hours' *actual* employment, whether broken by an intermission for lunch or on account of some other occasion. According to custom, too, especially in railroad-ing in the new western States, the actual service of employees is divided, necessarily divided, throughout the day, to correspond with the arrival and departure of trains. Certainly, Congress did not intend to override these existing customs; making it necessary either that the railroad company should not give intermissions, or that the employee should be paid notwithstanding the intermissions; and making it necessary at many stations (presumably well known to Congress) that the railroad should either employ a different telegraph operator for every train that came and went

(trains on western roads being often more than nine hours apart), irrespective of the fact that the actual service for each train was a very short period of time. The contention of the Government gives to this word 'period', all things considered, a highly strained meaning. Disregarding a meaning so strained, and reading the word in connection with the context, and *in the light of ordinary custom*, we are clear that the acts proven do not constitute an offense within the meaning of the law. And, if it be objected that under this construction of the law, it would be possible for the railroad company to require its operators to give their service for short period at short intervals, say every alternate hour, or any hour in every two hours and a half, thus so spreading his actual service over the twenty-four hours that no opportunity would be given for real recuperation, the answer is that no instance of such practice has been brought to our attention, and no such instance is likely, which accounts for the fact that no provision in the Act is made for such instances. When such practice actually occurs, Congress will doubtless provide a cure."

In *United States vs. Atchison, T. & S. F. Ry. Co.*, 212 Fed. 1000, District Judge *Sawtelle* rendered an Opinion which so thoroughly considers and decides all these questions, that we quote so much of it as pertains to this case in full, as follows, (nearly all italics being ours):—

SAWTELLE, District Judge. This is an action brought by the United States against the Atchison, Topeka & Santa Fe Railway Company, under the provisions of the act of Congress of March 4, 1907 (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), entitled, "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon."

Section 2 of said act is as follows:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

Section 3 provides "that any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be or remain on duty," in violation of said second section above quoted, "shall be liable to a penalty of not to exceed five hundred dollars for each and every violation."

The first three counts of the government's complaint relate to the conductor and two brakemen in charge of defendant's train No. 18, on October 4 and 5, 1912.

No. 18 was a mail, passenger and express train running between Los Angeles, Cal., and Phoenix, Ariz., and in the course of its run

passed through San Bernardino, Barstow, and Parker. Los Angeles was the initial terminal or starting point for this train, for its engine crew and also for its train crew, that is, its conductor and brakemen. The final destination of the engine crew was Barstow, of the train crew was Parker, and of the train itself was Phoenix. * * *

The train crew, therefore, was kept in continuous service for a period of 19 hours and 17 minutes.

The defendant, in its answer, admitted the excess service of the train crew, but set up an affirmative defense, to wit, that all of the excess service was due to the detention of train No. 18 at Summit by reason of a casualty or unavoidable accident unknown to the carrier, and which could not have been foreseen at the time No. 18 left "said terminal at Los Angeles." The answer (as amended) also alleged that train No. 18 did not leave "a terminal" of the defendant after the casualty had happened, or after it was known to the defendant. The defendant, therefore, attempted to bring itself within the proviso of section 3 of the Hours of Service Act, which reads as follows:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal and which could not have been foreseen."

The particular fact pleaded, and shown in evidence to be the casualty or unavoidable accident directly responsible for the excess service,

was the derailment of a freight car in a west-bound freight train between Barstow and Los Angeles, known as "Extra West 954." It is not necessary here to refer particularly to the movement of Extra 954, nor to the inspection to which it was subjected before it left Barstow, for the reason that the government does not contend that it was not properly inspected, but, for the purposes of this case, admits that the breaking in two of this extra near Summit and the consequent derailment of a car and the blocking of the main line at that point was clearly unavoidable and unknown and unforeseen to the carrier at the time train No. 18 left both Los Angeles and San Bernardino. At the time the train left Summit it was known to the officials of the company in charge of this train that the conductor and brakemen, if allowed to continue on their regular run to Parker, would be on duty over 16 consecutive hours. The evidence shows that Barstow was a terminal of the defendant for freight trains and freight crews, and also it was the terminal for one or more passenger crews running between Barstow and Bakersfield, but was not the terminal for passenger crews running between Los Angeles and Parker.

It is contended by the government that the court should direct a verdict in its favor for the following reasons: Barstow was a "terminal," within the meaning of that term in the proviso, and therefore any delays known to the officials of the company before train No. 18 left Barstow could not be accepted as an excuse, and that, even if Barstow were not a "terminal,"

as that term is used in the proviso, still train No. 18 was allowed to leave there, knowing that the conductor and brakemen would be in continuous service over 16 hours when a relief crew (although the evidence shows that at that time there was no passenger crew that could have been used as a relief crew on train No. 18) could have been put on this train at Barstow and relieved the old crew at any time within, or at the expiration of, the 16 hours.

[1] The complaint alleging, and defendant in its answer admitting, that the defendant had required or permitted its said employes on said train No. 18 above named to remain on duty for a longer period than 16 consecutive hours, this made a *prima facie* case. *United States v. Kansas City Southern Ry. Co.* (C. C. A. 8th Cir.) 202 Fed. 828, 121 C. C. A. 136; *C., B. & Q. R. R. Co. v. United States*, 195 Fed. 241, 115 C. C. A. 193.

There appear to be three separate provisions in section 2 of said act, the violation of which subjects the carrier to a penalty: (1) That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employé subject to this act to be or remain on duty for a longer period than 16 consecutive hours; (2) and whenever any such employé of such common carrier shall have been continuously on duty for 16 hours, he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; (3) and no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be re-

quired or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty.

Section 3 of said act sets forth the penalty for violation thereof, and then provides that the *provisions* (meaning all of the provisions of the act, including the one in section 2 above quoted, fixing a penalty for violation thereof) *shall not apply*—

“in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen: Provided further, that the provisions of this act shall not apply to the crews of wrecking or relief trains.”

[2] It is contended by the government that it was unlawful for the defendant company to have caused its employés to work or remain on duty after the 16-hour limit, longer than was necessary to reach the first proper stopping place where its crew could have been replaced, and there it should have been tied up, and that it was its—

“duty to have suitable stopping places where rest can be had for its employés, or proper places along its route proportionate to the exigencies of the business.”

It has been said that this act is remedial in its nature, and should “receive such construction as will give its general purpose reasonable effect.” To this we are agreed; but at the same time we cannot lend ourselves to a construction which would violate the plain letter of the act and entirely destroy the proviso therein contained. Had Congress not intended that the

carriers should be relieved in case of casualty, unavoidable accident, or the act of God, it would not have inserted the proviso in the act. It is a well-known fact that this legislation was before Congress for many months, and that much testimony was taken by the several committees of that body before the final draft of the act was completed; and we must assume that Congress intended that the carriers should be excused from the penalties of the act, and that the act should not apply whenever the delay was caused by casualty, unavoidable accident, or act of God.

The plain wording of the proviso involved is:

"The provisions of this act *shall not apply* in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen."

How, then, can this court assess a penalty in a case like the one at bar, where it is plainly shown that the crew were kept on duty by reason of casualty or unavoidable accident, in face of the statute, which for such causes excuses defendant? In cases of this nature, to adopt the construction contended for by the government would be equivalent to nullifying the proviso contained in the act, and would require of the defendant the performance of a duty not only not required, but expressly excused by the act itself. Had Congress intended that, in case of delay occasioned by "casualty, unavoidable accident or the act of God," the train should only be allowed to go to the first suitable stop-

ping place and there tie up, it would have inserted such a provision in the act—one similar to the provision contained in the amendment to the Safety Appliance Act, approved March 4, 1911 (Act March 4, 1911, c. 285, 36 Stat. 1397 [U. S. Comp. St. Supp. 1911, p. 1338]). Section 4 of this act (Act April 14, 1910, c. 160, 36 Stat. 299 [U. S. Comp. St. Supp. 1911, p. 1329]) contains a proviso as follows:

“That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure *to the nearest available point where such car can be repaired*, without liability for the penalties imposed by Section Four of this Act,” etc.

In this connection, it might be well to refer to the administrative rulings of the Interstate Commerce Commission, as contained in its Twenty-Second Annual Report, dated December 24, 1908. In referring to the act in question, the Commission said:

“Questions immediately arose as to its proper interpretation. With a view to explaining in so far as possible those features of the act which might be claimed to be ambiguous, the Commission issued the following administrative rulings: * * * ‘Section 3. * * * *Employés unavoidably delayed by reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or end of that run.*’ ”

Thus it appears that the Commission to which was intrusted the execution of this law,

and whose duty it was to ascertain whether or not its provisions were being observed, not only ruled that, "*Employés unavoidably delayed by reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or end of that run,*" but actually used the words "terminal" and "end of that run" synonymously. In other words, *they not only defined the word "terminal" to mean the equivalent of the end of that run, but actually held that employés unavoidably detained by reason of causes that could not, at the commencement of the trip, have been foreseen may "lawfully continue on duty to the terminal or end of that run."* See Conference Rulings of the Commission issued April 1, 1911, page 24, Rule 287, which is as follows:

"Any employé so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

See, also, pamphlet issued by the Interstate Commerce Commission, containing "The Hours of Service Law and the administrative rulings and opinions therein printed by order of the Commission March 25, 1912," which contains this same rule 287.

The Commission did not then believe that it was the duty of the carrier to stop the train at the first suitable stopping place and there tie up until the men could be relieved, as is contended was the duty of the railroad company in this case.

These administrative rulings were promulgated by the Commission because, as was stated

by them, questions immediately arose as to the proper interpretation of the act, and with a view to explaining, in so far as was possible, those features which might be claimed to be ambiguous, the Commission adopted the rulings above quoted; and it is reasonable to suppose that such administrative rulings were intended for the guidance of the carrier and trainmen and others having to do with the movement of trains. We heartily agree with the Commission that the terms of the act "are susceptible of more than one interpretation."

That the "construction of a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without potent reasons," was the rule announced at a very early day by the Supreme Court of the United States and reiterated in a very large number of cases. *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063, and cases cited.

We cannot adopt the interpretation contended for by the government in this case, namely, that if the train was delayed by reason of any of the causes set out in the proviso in section 3 of the act, the train crew may not lawfully continue on duty to the terminal or end of that run. This court holds that in such a case there is nothing in the act which requires a carrier to proceed to the next suitable stopping place and there tie up and relieve the crew, or which prevents the crew from continuing on duty and proceeding on their trip to the terminal or end of that run, which in this case was at Parker, even though at the time they left Summit, the

place where the train was delayed and remained on account of the unavoidable accident or casualty which occasioned the delay, they had no reasonable expectation of being able to reach the end of their run, Parker, within the 16-hour limit. In the opinion of this court, such a construction is not authorized.

The manifest purpose and effect of this statute is to prohibit railroad companies from requiring or permitting their employés to be or remain on duty for a longer period than 16 consecutive hours, except in case of casualty, unavoidable accident, or act of God, or where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time such employé left a terminal, and which could not have been foreseen, and in case of casualty, unavoidable accident, or the act of God, or where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employé at the time such employé left a terminal, and which could not have been foreseen, preventing the train crew from completing its run or reaching its destination within 16 hours from the time of going on duty for the run, to take the case out of the operation of the statute, and to permit the crew in charge of any train delayed by such casualty or unavoidable accident or act of God, or other cause not known to or which could not have been foreseen by the officers or agent of the carrier in charge of such crew at the time the crew left a terminal, to continue on duty to the end of the run, *except* where the officers or agent of the railroad in

charge of such crew or employés knew of the existence of, or could have foreseen, such casualty, accident, or act of God, or other cause of delay, before such train crew started upon its run upon which the delay occurred. *If* the officers or agent of the carrier in charge of such train crew knew of the existence of, or could have foreseen, the casualty, accident, or act of God, or other cause of delay, before such train crew started on its run, the statute would apply, regardless of the delay caused thereby, and the railroad company requiring or permitting such crew to continue on duty after 16 hours would, in such case, be liable to the penalty provided by the statute. In all other cases of casualty, unavoidable accident, or act of God, or other cause of delay, the statute would not apply. In other words, the proviso takes the case out of the operation of the statute in every instance except those in which the officers or agent in charge of the employé *knew*, or could have foreseen, the existence of the cause of the delay at the time such employé left the terminal or starting point.

The government also contends that the railroad company violated the provisions of said act by requiring or permitting the said train crew to remain on duty after leaving Barstow, upon the theory that Barstow, although not shown to be a terminal for train No. 18, or for the crew on said train, was nevertheless a terminal, and that said act makes it unlawful for a carrier to require or permit any employé to remain on duty in violation of section 2 of said act, because the proviso in said act contained does not

excuse the defendant "where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employé at the time such employé left a terminal"; in other words, that the officials of the defendant company knew of the unavoidable accident or casualty which was the cause of the delay to train No. 18 at the time said employés left Barstow, a terminal.

It does not appear that the word "terminal" has been judicially defined. According to the usage of railroad men in the United States, as shown by the evidence in this case, each train crew is assigned by the officers of the company to a definite, fixed run, beginning and ending at fixed points or places on its line of railroad; and, in my judgment, these fixed beginning and ending points of a given run for a given crew are the "terminals" of that run within the meaning of the word "terminal" as used in the proviso in section 3 of this act. In the usage of railroad men there are different "runs" for different train crews, and also different runs for different employés on the same train, and the run of an engineer on a passenger train might be different from the run of a conductor or brakeman. There may be one run for a freight crew and another run for a passenger crew, and these runs may not be, and usually are not, coterminous, and one run or several runs for freight crews may lie between the terminals of the run of a single passenger crew, and each of these runs has its own terminals. And in applying this act to a given case, regard must be had to the line of service

in which the train crew or employés in question were engaged at the time of the alleged violation of the act, and to that alone.

It follows that Barstow was not a terminal for train No. 18, or for said conductor or brakemen, and that the defendant did not violate said act by requiring or permitting the employés mentioned in the complaint to be or remain on duty for a longer period than 16 consecutive hours and in requiring said train crew to continue on duty to the terminal or end of that run."

In *United States vs. Missouri Pac. Ry. Co.*, 213 Fed. 169, the Circuit Court of Appeals for the Eighth Circuit, Circuit Judge *Sanborn* rendering the opinion, said:

"SANBORN, Circuit Judge. The United States complains that the court below overruled a demurrer to the answer of the defendant and rendered judgment in the defendant's favor in an action against it for an alleged violation of the hours of service act. The plaintiff alleged in its complaint that the defendant required and permitted its telegraph operator at Meneger Junction, Kan., an office and station operated only during the daytime, to remain on duty during the 24 hours, commencing at 7 o'clock a. m. December 11, 1911, more than 13 hours, in violation of "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907 (34 Stat. 1415. The defendant answered that its operator at

that station was on duty on December 11, 1911, from 7 a. m. until 12 noon and from 1 p. m. until 6 p. m. and from 7 p. m. on that day until 6:35 a. m. on December 12, 1911; that his hours of service in excess of 13 hours were due to this casualty and unavoidable accident; that through no fault or negligence of the defendant, its agents or servants, a derailment occurred on the main line of its railroad at Nearman, Kan., which made it necessary to detour its trains from Leavenworth to Kansas City over the defendant's branch line through Meneger Junction; that the defendant used every effort to clear its track, and expected to have it cleared by 11 p. m. on December 11th at the latest, but unavoidable difficulties delayed its clearing until 5 a. m. December 12th; that there was no telegrapher on its branch line, on its main line, or on its Omaha Division that could be sent to relieve the operator at Meneger Junction at that time; that after the unavoidable delay an attempt was made to secure a relief operator, but none could be found; that at the time the wreck occurred it might have been possible to secure an operator, but that the defendant did not know at that time that it would require so long to clear the main line. *The plaintiff demurred to this answer*, and counsel for the United States *contend that the decision overruling that demurrer was erroneous*: (1) Because the proviso of section 3 of the hours of service law is inapplicable to telegraphers, train dispatchers, and others of their class who fall under the terms of section 2 of the act; (2) because the failure of the defendant, under the

circumstances pleaded in the answer to secure a relief operator, constituted no excuse for keeping the regular operator on duty after the expiration of the 13 hours of service specified for him in section 2 of the act; and (3) because the derailment pleaded in the answer was not such a casualty or unavoidable accident as justified the defendant in keeping the operator on duty beyond the 13 hours of service specified in the act.

* * * * *

[1, 2] Are the provisions of section 2 which relate to telegraph operators, train dispatchers, and other employés of their class excepted from the declaration of the proviso of section 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God?" Counsel for the United States contend that this question should be answered in the affirmative because section 2 provides that telegraph operators and train dispatchers may serve "in case of any emergency" four hours longer than the time generally fixed for their services when there is no emergency, and they argue that this provision for four hours excess service limits all excess service by them, whether demanded by an emergency, a casualty, an unavoidable accident, or an act of God; that casualties, accidents, and grave catastrophies resulting from landslides, floods, and other external incidents bear more heavily upon other employés than upon telegraphers, and that the four-hour limitation in case of an emergency would become ineffective if any casualty, unavoidable accident, or act of God would relieve

"That the provisions of this act, except those in section 2, which relate to the hours of service of the operators and train dispatchers and others of their class, shall not apply in any case of casualty, or unavoidable accident or the act of God."

[5] But where the legislative body makes no exception to a general and clear declaration of its will, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so. *Madden v. Lancaster Co.*, 65 Fed. 188, 195, 12 C. C. A. 566, 573; *Omaha Water Company v. City of Omaha*, 147 Fed. 1, 13, 77 C. C. A. 267, 279, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; *Armour Packing Co. v. United States*, 153 Fed. 1, 18, 21, 82 C. C. A. 135, 152, 155, 14 L. R. A. (N. S.) 400; *Lafayette Co. v. Wonderly*, 92 Fed. 313, 316, 34 C. C. A. 360, 363; *Webber v. St. Paul City Ry. Co.*, 97 Fed. 140, 143, 38 C. C. A. 79, 82.

[6] Another approved rule of construction is that a rational, sensible and practical interpretation of a statute, one which will permit the accomplishment of the purpose of the act, should be preferred to one which is unreasonable or impracticable, or that would hinder or retard the accomplishment of that purpose. *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 965, 72 C. C. A. 9, 13, 2 L. R. A. (N. S.) 185; *Stevens vs. Nave-McCord Mercantile Co.*, 150 Fed. 71, 75, 80 C. C. A. 25, 29; *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed. 17, 27, 80 C. C. A. 97, 107, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357; *McPhee & McGinnity Co. v. Union Pacific R. Co.*, 158 Fed. 5, 17, 87 C. C. A. 619, 631. The purpose of the provision of

section 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God," evidently was to relieve the common carriers and their employés in such cases from all the provisions of the act limiting the hours of service of the latter, and the reason for the provision is plain. *Congress perceived, and reflection will convince any one,* that the protection, safety, and welfare of travelers and employés upon railroads require that in such cases *hard and fast rules shall yield to the demands of humanity and the necessities of the cases.* The *times when* such casualties will occur and when such cases will arise *cannot be foreseen.* *An unavoidable accident is as likely to occur within the last as within the first 10 minutes of the limited 16 hours of the service of a trainman.* It is as likely to occur within the last five minutes of the limited four hours excessive service of a telegraph operator as in the first minutes of his limited 9 or 13 hours of service. It is conceded that carriers and all of their employés, except operators, train dispatchers, and members of their class, are exempt from the limitation of their hours of service in every case of casualty, unavoidable accident, or act of God.

* * *

[7] There is still another rule of construction that persuades to the same conclusion. This is a suit for the collection of a penalty of \$500 for a violation of this act of Congress. The act created and denounced a new offense. A statute which creates a new offense and prescribes its punishment must clearly state the

persons and the acts denounced. An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made such by construction after it is committed, either by the interpolation of expressions, or by the expunging of its words by the judiciary. And as this statute not only failed clearly to denounce as an offense requiring or permitting an operator or train dispatcher to serve beyond the hours limited in section 2 in case of a casualty, an unavoidable accident, or the act of God, but positively declared that in such a case the provisions of the act which denounced such excessive service, as an offense did not apply, the defendant may not lawfully be punished for such an act. *United States v. Wiltberger*, 18 U. S. (5 Wheat.) 76, 96, 5 L. Ed. 37; *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; *First National Bank of Anamoose v. United States*, 206 Fed. 374, 376, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139.

And the result is that the plain terms of the statute, the reason of the case, and the rules and authorities upon the construction of statutes to which reference has been made have convinced that the proviso of section 3 of the "Act to promote the safety of employ  s and travelers upon railroads by limiting the hours of service of employ  s thereon," approved March 4, 1907, commonly known as the hours of service act, exempts a common carrier from liability for the penalty specified therein when in a case of casualty, unavoidable accident, or

the act of God it necessarily requires or permits a telegraph operator, train dispatcher, or other employé of their class to serve beyond the time limited for his service by section 2 of this act.

The next contention of counsel for the government is that the answer destroys the defense that the derailment therein pleaded presented a case of unavoidable accident because it pleads no sufficient excuse for the defendant's failure to furnish another operator to relieve the operator in charge at Meneger Junction, in other words, that the answer fails to plead that the defendant was not negligent in this regard. But this is not an action for the negligence of the company in failing to procure a relief operator within a reasonable time. It is an action for requiring the service of the operator in charge more than 13 or 17 hours, in violation of section 2 of the act, and the answer is that this was a case of a casualty or unavoidable accident, and that the prohibition of requiring the operator's service more than 13 hours, or more than 17 hours, is inapplicable.

Again, if the penalty here sought could have been recovered on account of the negligence of the defendant in securing a relief operator, *no such negligence was charged or pleaded.* All persons are presumed to discharge their duties faithfully until the contrary appears, and there was therefore a legal presumption that the defendant exercised due diligence to procure such a relief operator and this presumption is sustained by these facts, which are alleged in the answer and admitted by the demurrer.

[3] Finally, counsel for the United States insist that the unavoidable accident, the derailment pleaded in the answer, was not a casualty or an unavoidable accident because the defendant failed to use due diligence to avoid it, and they quote this sentence from the opinion of this court in *United States v. Kansas City Southern Ry. Co.*, 202 Fed. 828, 833, 121 C. C. A. 136, 141:

"To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at, and the practical operation of its railroad."

But counsel are estopped from making this contention by their demurrer which admits this averment of the answer, "that through no fault or negligence of the defendant company, its agents or servants, a derailment occurred on the line of the defendant," and this is an averment that, however high the degree of diligence and foresight required in regard to this derailment, the defendant exercised that degree, for so only could it have been without fault or negligence.

The court below committed no error in overruling the demurrer to the answer and the judgment below is affirmed."

Section 2 of this Act expressly prohibits: 1—requiring or permitting employees to remain *on* duty for a longer period than 16 consecutive hours; 2—not relieving employee who shall have been continuously on duty for 16 hours; 3—allowing employee *ten* consecutive hours *rest*; 4—allowing *eight* con-

secutive hours *rest* where employee *on duty in the aggregate* 16 hours.

A fair and reasonable construction of this Section 2, and the *Proviso* of Section 3, *Exempting absolutely* cases of casualty, unavoidable accident, act of God, and where the *delay* was the result of a cause not known when train left a terminal and could not be foreseen, is this: that in *such* cases the train crew may be continued in service and on duty to the end of their *run* or their *terminal*, but *must be allowed their* 10 consecutive hours *rest before* being required or permitted to go *on duty* again.

In *United States vs. Atchison T. & S. F. Ry. Co.* 212 Fed. 1000, Judge *Sawtelle* very fully discusses the meaning of "terminal" as used by railroads and intended by this Act, and on page 1007 says:—

"It does not appear that the word "terminal" has been judicially defined. *According to the usage of railroad men in the United States*, as shown by the evidence in this case, *each train crew is assigned* by the officers of the company to a definite fixed run, beginning and ending at fixed points or places on its line of railroad; and, in my judgment, these fixed beginning and ending points of a given run for a given crew are the "terminals" of that run within the meaning of the word "terminal" as used in the proviso in section 3 of this act. In the *usage of railroad men there are different 'runs' for different train crews*, and also different runs for different employees on the same train,

and the run of an engineer on a passenger train might be different from the run of a conductor or brakeman. There may be one run for a freight crew and another run for a passenger crew, and these runs may not be, and usually are not, coterminous, and one run or several runs for freight crews may lie between the terminals of the run of a single passenger crew, and each of these runs has its own terminals. And in applying this act to a given case, regard must be had to the line of service in which the train crew or employes in question were engaged at the time of the alleged violation of the act, and to that alone.

“It follows that Barstow was not a terminal for train No. 18, or for said conductor or brakemen, and that the defendant did *not violate* said act *by requiring* or permitting the employes mentioned in the complaint *to be or remain on duty for a longer period than 16 consecutive hours and in requiring said train crew to continue on duty to the terminal or end of that run.*”

In U. S. vs. Northern Pac. Ry. Co. 215 Fed. 64, 67, this Court, Circuit Judge *Ross* rendering the Opinion, where the charge was *continuing* the train crew *on duty, without rest, after* an “unavoidable accident,” said:—

“ * * * it is expressly conceded by Counsel for the Government that the *delay* of the crew in question on its regular run from Tacoma to Portland was due to the “unavoidable accident” at South Tacoma. It is equally plain

from the undisputed evidence that the accident was the sole cause why the crew in question was engaged on its run for more than 16 hours without a rest of 8 consecutive hours, so that the question is, whether the circumstances of the case bring it within the first proviso in Section 3 of the Act of Congress, upon which the action is based. * * * Under such circumstances, it would not, we think, be reasonable to hold the Company liable for their failure to check up the time of service of the various crews of the very numerous trains passing over this particular piece of road at that particular time. And *such*, we think, *was the view of Congress in providing, as it did, that the Act of May 4, 1907, should "not apply in any case of casualty or unavoidable accident."*

"We are of the opinion that the Court below was right in holding that the circumstances of the present case brought it within that proviso."

In the present case, the learned Counsel for the Government, on page 12 of their *Brief*, say:—

"In the case now under consideration the train was delayed by an unavoidable accident."

And again, page 11: "While the pleadings in the instant case *ask credit only for the time lost by reason of an unavoidable accident,*" etc.

II

The Government's *Demurrer* (Tr. p. 23-24), raised the following points *only*:—

and they did not exist or the Government would not have stood on its demurrer and waived proof of the facts on a trial.

4—It does not appear that the Defendant made *any effort* to relieve this crew *before* the 16 hours expired.

This ground is covered by the last suggestions.

5—That the facts pleaded do not constitute a defense.

If, as charged, the *overservice* was 1 hour and 30 minutes, and the *unavoidable accident* caused this exact period of *delay and overservice*, and the Answer does sufficiently state these facts, it undoubtedly states a defense, if an overservice caused by an unavoidable accident be a defense or excuse as it is within the first proviso of Section 3.

III

The charge in the *last six* counts of the Complaint is, that the Defendant in Error required the members of this train crew, between their *starting* terminal Tucson and their *destination* terminal Bowie *to remain on duty* 1 hour and 30 minutes *overtime*. (Tr. p. 7-13.)

The *Answer* of Defendant in Error to this charge is: (a) that the train was *delayed* en route 1 hour and 30 minutes; *how?* (b) by reason and on account of *the train breaking in two*, as a result of *what?*

(c) *A cause not known to the Defendant, &c. at the time said train left Tucson; Why?* (d) because 1st it was caused *by an unavoidable accident*, and 2d, such breaking in two *could not have been foreseen.*

The *Proviso* of Section 3 of this Act, expressly declares:

“Provided, *that the provisions of the Act shall not apply in any case of (a)—casualty; (b)—Unavoidable Accident or Act of God; nor where the delay was the result of a cause not known to the carrier * at the time said employee left a terminal, and which could not have been foreseen.*”

The *Government* contends (1)—That this *Proviso* is *not* absolute and does not remove the run of the train between the *fixed service* terminals of the train crew, out of the requirements of Sections 1 and 2 of this Act, but leaves the train crew *still subject* to the provisions of Sections 1 and 2, with the *time* of service running, and imperatively requiring their relief at the end of 16 hours and the 10 hours of rest; regardless of the *intervention* of the four cases and conditions the happening of which it appears certain was intended by Congress to *lift that train crew and their service* out of the Act, and leave such train and its crew and their service in the same position they would be had this Act never been passed; and the *Government* contends: (2)—That this *Proviso* of Section 3 does *not* have *any effect at all* on the *service of the train crew, unless the Rail-*

road is able to show *conclusively* that it was impossible to relieve the crew, because of the time or the place or the practically absolute impossibility of obtaining a relief crew, within the 16 hours, and this too, notwithstanding how far away from or how near to the crew terminals or their homes these *proviso conditions* existed; and overlooking the apparent absurdity of their first contention by the result of their admissions as to the *effect* of the *proviso conditions*, admitting that, while asserting the causes and evils resulting in the enactment of this Act to be protection of the Public and the crews from *too long* service and *too short* rest—these causes and evils their contention concedes may still exist and continue for periods of service *no matter how long*, and the railroad be exonerated if it be *practically impossible* to relieve the crew within the 16 hours.

The Defendant in Error insists, that when *any* one or more of the *four* cases and conditions enumerated in the Proviso of Section 3 arise, that train and its crew are obviously intended to be taken absolutely without the provisions of this Act, and left as to its future progress with that crew between that crew's terminals of service, with the same effect as if this Act had never been passed; that when any one or more of these *proviso conditions* happen to any train and its crew while passing from the starting service terminal to the terminating service terminal of that crew, the Railroad is *not subject to any* of the provisions of this Act, and cannot be penalized because, from the time of leaving their service term-

inal, owing to the occurrence of any one or more of this *proviso* conditions, that train and its crew continue in service more than 16 hours in reaching their destination terminal, or starting terminal if they return thereto *after* the occurrence which brings the train and its crew within this *proviso*.

Are we correct in this contention? We submit that this contention is correct and that we are supported by:—

First: The *Interstate Commerce Commission* in its Ruling 88, ruled and held, as quoted by District Judge *Sawtelle*, in *U. S. vs. A. T. & S. F. Ry. Co.*, 212 Fed. 1000, 1005, as follows:—

“In this connection, it might be well to refer to the administrative rulings of the Interstate Commerce Commission, as contained in its Twenty-Second Annual Report, dated December 24, 1908. In referring to the act in question, the Commission said:

“Questions immediately arose as to its proper interpretation. With a view to explaining in so far as possible those features of the act which might be claimed to be ambiguous, the Commission issued the following administrative rulings: * * * ‘Section 3. * * * *Employés unavoidably delayed by reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or end of that run.*’ ”

Thus it appears that the Commission to which was intrusted the execution of this law, and whose duty it was to ascertain whether or not its provisions were being observed, not only ruled that, “*Employés unavoidably delayed by*

reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or end of that run," but actually used the words "terminal" and "end of that run" synonymously. In other words, *they not only defined the word "terminal" to mean the equivalent of the end of that run, but actually held that employes unavoidably detained by reason of causes that could not, at the commencement of the trip, have been foreseen may "lawfully continue on duty to the terminal or end of that run."* See Conference Rulings of the Commsision issued April 1, 1911, page 24, Rule 287, which is as follows:

"Any employé so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

See, also, pamphlet issued by the Interstate Commerce Commission, containing "The Hours of Service Law and the administrative rulings and opinions therein printed by order of the Commission March 25, 1912," which contains this same rule 287.

The Commission did not then believe that it was the duty of the carrier to stop the train at the first suitable stopping place and there tie up until the men could be relieved, as is contended was the duty of the railroad company in this case.

These administrative rulings were promulgated by the Commission because, as was stated by them, questions immediately arose as to the proper interpretation of the act, and with a view to explaining, in so far as was possible,

those features which might be claimed to be ambiguous, the Commission adopted the rulings above quoted; and it is reasonable to suppose that such administrative rulings were intended for the guidance of the carrier and trainmen and others having to do with the movement of trains. We heartily agree with the Commission that the terms of the act "are susceptible of more than one interpretation."

That the 'construction of a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without potent reasons," was the rule announced at a very early day by the Supreme Court of the United States and reiterated in a very large number of cases. *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063, and cases cited."

Second:—By the decision of District Judge *Sawtelle*, in the above cited case (reported 212 Fed. 1000).

Third:—By the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of *U. S. vs. Missouri Pac. Ry. Co.* 213 Fed. 169 (quoted from above), Circuit Judge *Sanborn* rendering the Opinion said;—

"The plaintiff demurred to this answer, and counsel for the United States contend that the decision overruling that demurrer was erroneous: (1) Because the proviso of section 3 of the hours of service law is inapplicable to telegraphers, train dispatchers, and others of

if any casualty, unavoidable accident, or act of God would relieve telegraphers from all limitation, of the hours of service. But there are many emergencies in the operation of railroads which are neither caused by nor are they casualties, unavoidable accidents, or acts of God, and the application of the four-hour limitation of excessive service to such emergencies would give it ample scope and effect. Moreover, even if the meaning of the word "emergencies" were identical with the aggregate meanings of the words "casualties, unavoidable accidents and acts of God," neither of the two provisions under consideration would be effective and they would only be cumulative. Each would have force. * * *

There are other reasons not less convincing why the position of counsel for the government is not tenable. If the parts of this act of Congress that are not relevant to the question under consideration are laid aside, the clear terms of section 2 prohibit the service of telegraph operators and train dispatchers in day offices more than 13 hours, and in cases of emergency more than 4 hours longer in 24 hours, prohibit the service of such operators and dispatchers in night and day offices more than 9 hours and in case of emergency more than 4 hours more in 24 hours, and prohibit the service of other employés more than 16 hours in 24 hours. The expressed terms of section 3 make every common carrier liable for a penalty of \$500 for every violation of section 2, and declare that *none* of the provisions of the act *shall apply* in any case of casualty, unavoidable accident, or

their class who fall under the terms of section 2 of the act; (2) because the failure of the defendant, under the circumstances pleaded in the answer to secure a relief operator, constituted no excuse for keeping the regular operator on duty after the expiration of the 13 hours of service specified for him in section 2 of the act; and (3) because the derailment pleaded in the answer was not such a casualty or unavoidable accident as justified the defendant in keeping the operator on duty beyond the 13 hours of service specified in the act. * * *

[1, 2] Are the provisions of section 2 which relate to telegraph operators, train dispatchers, and other employés of their class excepted from the declaration of the proviso of section 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God? *Counsel for the United States contend* that this question should be answered in the affirmative because section 2 provides that telegraph operators and train dispatchers may serve "in case of any emergency" four hours longer than the time generally fixed for their services when there is no emergency, and they argue that *this provision for four hours excess service limits all excess service by them*, whether demanded by an emergency, a casualty, an unavoidable accident, or an act of God; that casualties, accidents, and grave catastrophies resulting from landslides, floods and other external incidents bear more heavily upon other employés than upon telegraphers, and that the four-hour limitation in case of an emergency would become ineffective

act of God. If *none* of the provisions of the act *apply* in any case of casualty, unavoidable accident, or act of God, then the provisions of the act which prohibit the service of telegraph operators and train dispatchers in day offices for a longer period than 13 hours, and in case of emergency 4 hours more in 24 hours, do not apply in such cases, and so it is that the unambiguous terms of the act expressly declare that *the limitations of the hours of service* of telegraphers and train dispatchers in section 2 have no application in any case of casualty, unavoidable accident, or act of God. * * *

[4] The apparent and natural meaning of the terms of a statute is always to be preferred to any curious hidden signification deduced by the reflection and ingenuity of acute and powerful intellects, and where the language of a statute is unambiguous and its meaning is plain, no room is left for construction. *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; *First National Bank of Anamoose v. United States*, 206 Fed. 374, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139.

Congress had the right and power *to prohibit the application of all or of only a part* of the provisions of the act in cases of casualties, unavoidable accidents, and acts of God. It enacted "that the provisions of this act *shall not apply* in any case of casualty or unavoidable accident or the act of God," and it made no exception. The construction for which counsel for the government contends requires the amendment of this prohibition by the interpo-

lation of an exception therein so that it will read:

“That the provisions of this act, except those in section 2, which relate to the hours of service of the operators and train dispatchers and others of their class, shall not apply in any case of casualty, or unavoidable accident or the act of God.”

The *purpose* of the provision of section 3, “that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God,” evidently was *to relieve* the common carriers and their employés in such cases *from all* the provisions of the act *limiting* the hours of service of the latter, and the reason for the provision is plain. *Congress perceived, and reflection will convince any one*, that the protection, safety, and welfare of travelers and employés upon railroads require that in such cases *hard and fast rules shall yield* to the demands of humanity and the necessities of the cases. The *times when* such casualties will occur and when such cases will arise *cannot be foreseen*. *An unavoidable accident is as likely to occur within the last as within the first 10 minutes of the limited 16 hours of the service of a trainman*. It is as likely to occur within the last five minutes of the limited four hours excessive service of a telegraph operator as in the first minutes of his limited 9 or 13 hours of service. It is conceded that carriers and all their employés, except operators, train dispatchers, and members of their class, are exempt from the limitation of their hours of service in every case of casualty, unavoidable accident, or act of God. * * * The object of

the statute, the safety of travelers and employés, the necessities of the cases of railroad casualties and accidents, the demands of humanity, and a rational and practical interpretation of the statute converge with compelling force to convince that the *Congress intended* what it expressed, that "the provisions of the act," *all the provisions* of the act, those relating to the hours of service of telegraphers and train dispatchers, as well as those relating to the hours of service of other employés, "*shall not apply* in any case of casualty or unavoidable accident or the act of God."

Third: By the *Supreme Court*, in *Missouri K. & T. Ry. Co. vs. U. S.*, 34 *Supreme Court Reporter*, 26, 27 (decided: November 10, 1913), where Mr. Justice *Holmes* rendering the Opinion seems to have treated the question as *undisputed*, using the following language:—

"Without stopping to consider whether this argument would be met by the *proviso* declaring a "*delay*" in certain cases *not within the Statute* * It is urged that in one case the delay was the result of a cause, a defective injector, that was not known to the carrier and could not be foreseen when the employees left a terminal, and that *therefore, by the proviso in Section 3, the Act does not apply.*"

Fourth:—And by *this Circuit Court of Appeals*, in *U. S. vs. Northern Pac. Ry. Co.* 215 *Fed.* 64, 67 (decided August 3, 1914), where Circuit Judge *Ross* rendering the Opinion uses this language,

Where the charge was *continuing* the train crew *on duty, without rest, after* an “unavoidable accident”:—“ * It is expressly conceded by Counsel for the Government that the *delay* of the crew in question on its regular run from Tacoma to Portland was due to the “unavoidable accident” at South Tacoma. It is equally plain from the undisputed evidence that the accident was the sole cause why the crew in question was engaged on its run for more than 16 hours without a rest of 8 consecutive hours, so that the question is, whether the circumstances of the case bring it within the first proviso to Section 3 of the Act of Congress, upon which the action is based. * Under such circumstances, it would not, we think, be reasonable to hold the Company liable for their failure to check up the time of service of the various crews of the very numerous trains passing over this particular piece of road at that particular time. And *such*, we think *was the view* of Congress *in providing, as it did, that the Act of May 4, 1907, should “not apply in any case of casualty or unavoidable accident.”*”

Fifth:—By the Supreme Court of South Carolina, in *Black vs. Charleston & Western C. Ry. Co.*, 69 S. E. 230, 31 L. R. A. N. S. 1184, where that Court said of this Act of Congress:—

“Moreover, *by its own terms, the Act does not apply* in cases of casualty, unavoidable accident, or the Act of God; *nor* where the *delay* was the result of a cause not known to the carrier when the employees left a terminal, and which could not have been foreseen. There-

fore, if the *delay* was due to any of said causes, it would *not* have been a violation of the Act of Congress to permit the crew to remain on duty more than 16 hours * * *".

Therefore, we respectfully submit, that when *any* one or more of the *four* conditions enumerated and stated in the *proviso* to Section 3 of this Act, occur, that train and its train crew so involved, are absolutely lifted out of and exempted from *all* of the provisions of the entire Act, with the same effect and result as if this Act had never been passed, and the *crew* of that train may be permitted to remain *with their train on duty until* that train either returns to its starting or reaches its destination *service terminal* of that crew, without any violation of this Act.

It is respectfully submitted, that the judgment appealed from by the Writ of Error in this case, should be affirmed.

FRANCIS M. HARTMAN,
CHAS. J. HEGGERTY,
KNIGHT & HEGGERTY,

Attorneys for the Defendant in Error.

9

NO. 2443.

**United States Circuit Court of Appeals
for the Ninth Circuit.**

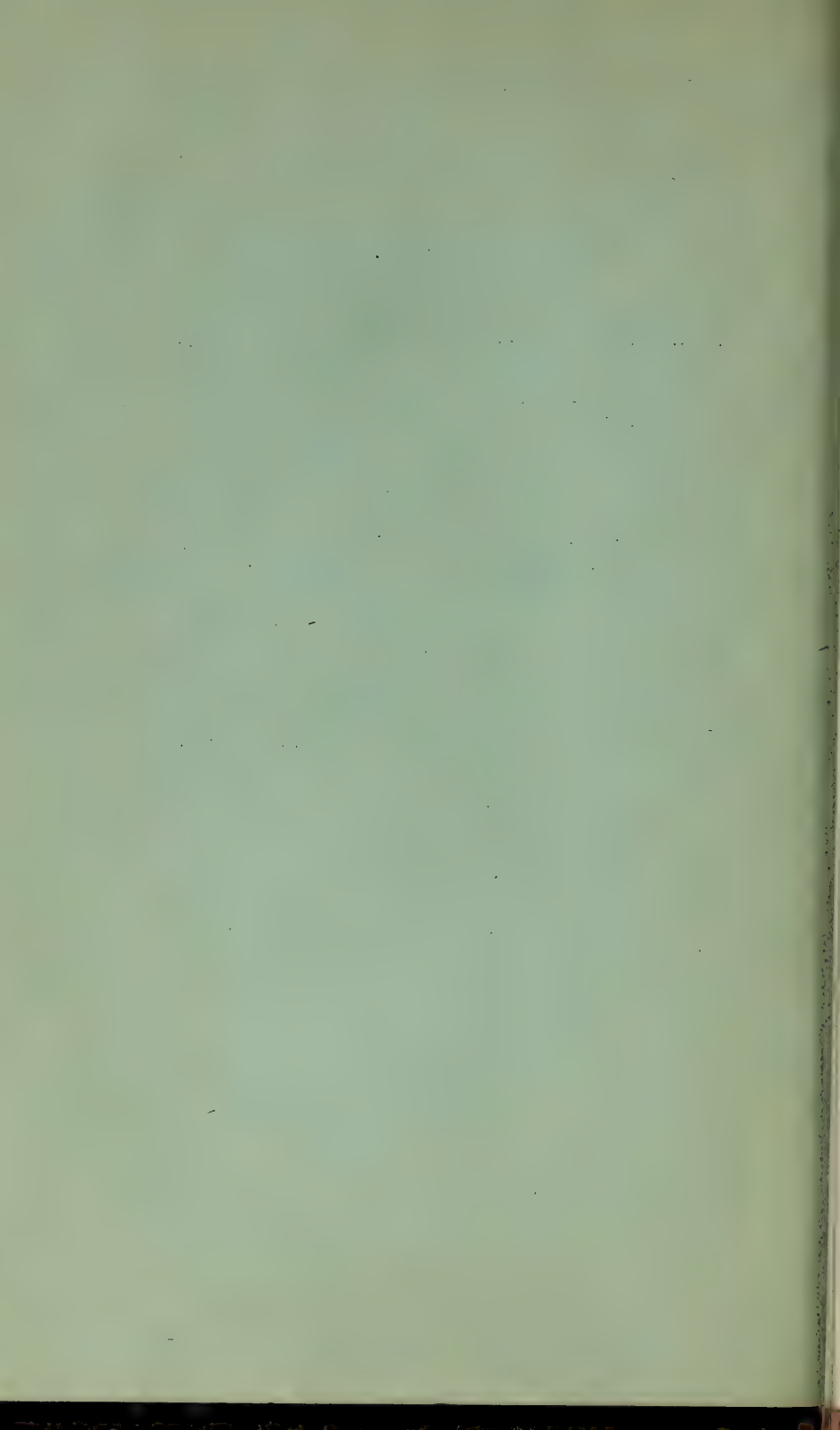
THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
THE SOUTHERN PACIFIC COMPANY, DEFENDANT IN
ERROR.

Plaintiff
SUPPLEMENTAL BRIEF OF ~~DEFENDANT~~ IN ERROR.

PHILIP J. DOHERTY,
Special Assistant, United States Attorney.

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United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF tiff in error,	}	No. 2443.
v.		
THE SOUTHERN PACIFIC COMPANY, DEFENDANT fendant in error.		

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SUPPLEMENTAL BRIEF OF ~~DEFENDANT~~ IN ERROR.

ARGUMENT.

I.

Supplemental to the brief originally filed in this case the attention of the court is respectfully called to the following considerations:

Broadly stated, the question involved is: Is the mere happening of a break-in-two of a train an unavoidable accident; and if so, may a carrier keep a train crew on duty for more than 16 hours if such crew has been delayed by such break-in-two without showing by the carrier that such occurrence was without its negligence and without any showing on its part that it was not practicable to relieve such train crew after its detention by reason of such occurrence and before they had been on duty for more than 16 hours? Or, may a railroad after delay so caused permit the crew of a train so delayed to remain on duty without limit as to hours

of service and without showing an effort or diligence to relieve them?

Under decisions of the Supreme Court, of this court, and of all other courts where the subject has been considered, this statute is entitled to a broad and liberal construction as a remedial act passed to meet a situation of danger to employees and the traveling public.

Judge Amidon in *United States v. Minn. St. Paul & Sault Ste. Marie Ry. Co.*, January 21, 1913 (not officially reported), said:

No truth of science, however, is better established than that fatigue is not simply a matter of muscles, but that it involves nerves and brain as well, and extends to all the faculties of the mind itself. It produces physiological changes which deaden the will and impair the sense of sight and hearing. It is as truly a physical cause of accident as are open switches and broken rails.

And so it seems to follow that no construction, literal or otherwise, is to be followed which would leave unaffected or unimpaired the *actual menace* at which the legislation was aimed.

The defendant in its answer admits continuous service of the train crew here in question for 17 hours and 30 minutes and pleads unavoidable accident.

Under the adjudication of the courts this answer is insufficient, and the demurrer thereto should have been sustained.

In the case of *United States v. Kansas City Southern Railway* (202 Fed. 828), the court said in reference to the proviso in the act relative to casualty, unavoidable accident, or act of God, "to bring it within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at and the practical operation of its railroad."

The Government in this case contends that unless the *service* in excess of 16 hours *necessarily* results from the casualty the statutory limitation of the hours of service is applicable.

The safety of the public involved and the wording of the proviso, construed according to the purpose and object of the law, seems to justify this contention.

The part of the proviso on which the defendant relies reads as follows:

That the provisions of this act shall not apply in any case of casualty or unavoidable accident or act of God.

The general wording of this proviso necessarily calls for restriction and limitation.

Excess service is not excused by reason of a casualty or unavoidable accident happening at any time or at any place. The proviso seems to call for the construction that it applies only to casualty or unavoidable accident which, from its location or time of occurrence, necessarily causes excess service of the particular employees in question.

Because of the generality of its literal terms, the proviso must necessarily be restricted in its scope to save the statute from being overwhelmed in the exception.

The limited and restricted construction to be given in the proviso in a remedial statute which creates exceptions to a general rule laid down therein is a recognized rule of construction. *United States v. Dickson* (15 Pet., 141, 165), as quoted in the original brief on page 14.

The Government's contention is that the casualty must be one that necessarily causes excess service, and this seems to be justified by the opinion of Circuit Judge Lurton, afterwards Justice of the Supreme Court, in a case under the 28-hour law cited in the original brief (page 25), "It must appear that the storm 'prevented' obedience."

If the casualty had no necessary connection with the excess service, Congress surely did not intend to permit service beyond the period fixed by it as a maximum in the interest of safety.

If, in the exercise of the high degree of diligence which the subject involved demands, such excess service may be guarded against even if a casualty or an unavoidable accident has occurred, then there is no necessary connection between the casualty and the excess service.

This court has substantially pointed out the line of demarcation in the recent case of the *United States v. Northern Pacific Railway Company*, de-

cided August 3, 1914. In that case the railroad was released from liability because of an accident which the court said was the “ *sole cause* ” of the excess service.

There a critical continuing emergency resulting from a casualty involving the death of and injury to passengers prevented the train dispatchers from relieving the train crew in question. This court, however, said, “Undoubtedly the train dispatchers, both at Tacoma and Portland, *would, under ordinary conditions, be held* to have known that the delay of train No. 303 at South Tacoma and the transfer of its crew and passengers to train No. 314 could not have enabled them to reach Portland in time for the same crew to return to Tacoma on its regular train No. 308 without being kept on duty for more than 16 hours without a consecutive rest of 8 hours..”

This court, in describing the conditions of affairs existing in the Northern Pacific Company case, used the expression “where necessarily growing out of such a disaster.” The words “where necessarily growing out of such a disaster,” used by the court may not, from their context, have the application which the Government is now seeking to have made, but they are apt words to express clearly the conditions when a casualty will excuse under this act. Where *necessarily* growing out of such a disaster the condition of affairs was such that there was no reasonable opportunity to relieve the men,

the statute may not apply. But where excess service does not necessarily grow out of disaster, but grows out of a neglect to relieve the train crew when such relief was reasonably accessible, or would have been accessible if the standard of care required under the circumstances had been exercised, the carrier is not excused from liability under the act.

On this aspect of the case we get some light from the opinion of Chief Justice White in the case of *Northern Pacific Company v. The State of Washington* (222 U. S., 370), in which reference is made to the extended time given for the act to go into effect for the purpose of enabling railroads to meet the "changed conditions" arising from the act.

And the opinion quotes from the report of the congressional committee in substance to the effect that railroads, in many instances, would be required to change division points to comply with the provisions of the act.

When the act became operative it was incumbent upon the railroads to have division points so placed that the relief of train crews would be made practicable in order to prevent service in excess of 16 hours.

It may well be that a casualty may be the necessary cause of *delay* and not the necessary cause of *excess service*.

To establish a defense, railroads must show that the excessive service performed was a necessary consequence of the casualty. If the men could have

been relieved, then the excess service was not a necessary consequence of the casualty.

It has been one of the ordinary instances of rail-roading, since this act went into effect, to send employees from one station or division point to another in order to relieve train crews and avoid excess service.

The mere recital in an answer of delay to a train caused by unavoidable accident is not sufficient of itself to establish a defense. The defendant must go further and establish a causal connection between the unavoidable accident and the excess service in question.

Rulings of the Interstate Commerce Commission.

But it is said that the rulings of the Interstate Commerce Commission are in conflict with the contention here made by the Government.

The *first* ruling of the Interstate Commerce Commission upon this subject is under date of March 16, 1908, and the material portion is as follows:

The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (See rule No. 88.)

This seems to set up a standard of diligence and to express an opinion that excess service is justified

under the proviso only where such excess service can not be guarded against and where there is no lack of precaution, and then only to enable a train crew to reach a terminal or relay point.

All the subsequent rulings of the Commission on this subject must be read in the light of this first one which remains unaffected by any modification or withdrawal.

As far as this ruling raises the standard of diligence and absence of negligence it seems to have been fortified judicially by the decision of the Eighth Circuit Court of Appeals in *United States v. Kansas City Southern Railway* (202 Fed., 828) where the court said:

By this act it (Congress) sought to prevent railroad employees from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at and the practical operation of its railroad.

And this high degree of diligence has been held by several district courts (in cases cited in our original brief) to require the release or tying up of crews to prevent excess service, and this even when such train has been delayed theretofore by an excusable cause.

There is only one reported case to the contrary and that is the case decided by Judge Sawtelle,

United States v. Atchison, Topeka & Santa Fe (212 Fed., 1000). In that case the learned judge reached a conclusion adverse to the Government's contention in case at bar, and insists upon the "plain wording" of the proviso in section 3 (p. 1004). He seems to overlook the well-recognized ruling of the strict construction of the proviso carved out of a remedial act.

The "plain wording" of the proviso "in any case of casualty or unavoidable accident" gives no guide as to whether these words apply to crews of trains directly involved in such casualty, or whether they include crews of trains who are only indirectly involved. The plain words do not make clear the *extent* to which train crews involved may be relieved by the occurrence of casualty or unavoidable accident or whether the casualty delaying a train crew for one hour may excuse excess service for several hours, or whether or not the application of the act is suspended only so far as the casualty necessarily and unavoidably prevents compliance, taking into account the practical difficulties arising in operation of railroads, and bearing in mind the purpose and object of the act to which the proviso established exceptions.

As the plain wording of the proviso does not suffice, the Government contends for the latter construction which will carry out the purpose and intent of the act.

The comment of the learned judge in the *Santa Fe* case just referred to upon the rulings of the In-

terstate Commerce Commission disregards entirely the first ruling on the subject of the proviso and the judicial support of that rule to which we have hereinbefore referred.

The reference in that case to the well-known fact that this legislation was before Congress for many months, and the inference drawn therefrom, seems to be answered by the fact that the legislative history of the act shows that it was framed and altered and changed and amended in the closing hours of an exciting session of Congress, and after its passage a general resolution making a change in the text was made.

The suggestion that Congress, in order to give the construction contended for by the Government, could well have used the special terms applied in the supplemental safety-appliance act of April 14, 1910, is of doubtful force when it appears that the latter act was another piece of legislation by another Congress at a later date and upon another subject.

A similar argument was made as to the construction of another clause of this statute by counsel for the appellant in *Missouri, Kansas & Texas Ry. Co. v. United States* (231 U. S., 114).

“ Had it been intended that a penalty should be incurred for each employee Congress would have clearly so provided as it did in other statutes ” (citing statutes), but the Supreme Court in the *Missouri, Kansas & Texas* case in its decision gave no force to this suggestion.

Justice Holmes, in the *Missouri, Kansas & Texas Ry. Co. v. United States* (231 U. S., 118), says:

But unless the statute requires a different view, to call the delay of the train the act that produced the wrong is to beg the question. (Citing cases.) The statute was not violated by the delay. That may have made keeping the men overtime more likely, but was not in itself wrongful conduct *quoad hoc*.

The wrongful act was keeping an employee at work, and that act was distinct as to each employee so kept.

And so we contend that the proviso must be considered to mean that the act shall not apply where the casualty, etc., necessarily causes the keeping of the men overtime. Casualties may cause delays which make keeping the men overtime necessary.

Unless they *cause* the overtime they do not excuse.

Judge Sawtelle further says (p. 1006):

If the officers or agents of the carrier in charge of such train crew knew of the existence of or could have foreseen the casualty, etc., before such crew started on its run, the statute would apply, regardless of the delay caused thereby, and the railroad company requiring or permitting such crew to continue on duty after 16 hours would, in such case, be liable to the penalty provided by the statute.

Now, why should not the same logic apply to similar knowledge before the train left any other

terminal? Why should there be a qualification of terminal to mean initial terminal?

The plain wording of the act is "a terminal," naturally meaning any terminal.

The construction of the act by Judge Sawtelle seems to amend the act by changing the words "a terminal" to "the terminal or *starting point*."

But Congress deliberately changed the words "his terminal," which might properly be susceptible of the meaning given to the proviso by Judge Sawtelle and by the appellants here, to the broader, more inclusive, and comprehensive words "a terminal."

This is a meaning plainly in accord with the wording of the proviso, with the history of the act, and with the purpose and intent of Congress in its enactment.

Perhaps the crux of the whole case is this:

Unless the *requirement* or *permission* of the *excess* service is a *necessary* consequence of a casualty, etc., the whole purpose and intent of the act indicates such requirement and permission is unlawful, but in so far as excess service is *necessary* to bring the train into the field of normal railroad operation such service is excused under the proviso.

After *delays* from excusable causes *are over* and the train reaches relay points, terminals, or other places where it is *practicable* to relieve a train crew, the excuses named in the proviso are not available as a defense for further requirement of service if the 16-hour period has then been reached. As

there was no suggestion in the answer that the relief of this crew at the end of 16 hours, or as soon thereafter as was practicable, was prevented by the unavoidable accident referred to, it was insufficient as a statement of defense.

Congress expressly provided in section 2 of the hours of service act that "whenever any such employee of such common carrier shall have been on duty for 16 hours he shall be relieved * * *." A defense therefore to the act must show a necessary connection between the casualty or unavoidable accident and the noncompliance with the obligation to relieve. To show delay of a train is not sufficient. The relation of the casualty or unavoidable accident as an obstacle to the relief of the train crew at the expiration of 16 hours must be indicated in order to state a defense.

No sufficient allegation of unavoidable accident in answer.

The defendant's answer admits the excess service and sets up that the train, on which the persons constituting the crew of extra No. 2794 were employed, was delayed and detained en route * * * for the period of 1 hour and 30 minutes on account of and by reason of the said train breaking in two.

The mere breaking in two of a train is not, under all conditions and at all times, an unavoidable accident.

The break in two may be a mere parting of the train from a disconnection of the couplers or be-

cause the couplers are somewhat worn, but we will treat the case upon the assumption that the break-in-two in this case was due to defective couplers or to the breaking of the couplers or to the pulling out of a drawbar.

This is not of such an unusual occurrence as to be regarded as within the terms of the proviso relating to "casualty, or unavoidable accident, or act of God."

In order that the court may realize the frequency with which men are kept on duty by reason of defects in coupler equipment attention is called to the Statistical Analysis of Carriers Monthly Hours of Service Reports for the fiscal year ending June 30, 1913, published by the Interstate Commerce Commission, November, 1913. By this analysis it appears that *out of a total of 261,332* railroad employees retained on duty in excess of the statutory period *33,360 of these cases* of excess service were reported to have been *due to coupler and drawbar defects*.

Pulling out of drawbars can generally be attributed to two causes:

(a) *Failure to properly inspect the car, or (b) unfair usage by the engineer in handling the train.*

(a) Unless in a case of clear breaking in the part of the coupler head itself, the defect in a coupler, which tends to make it break and draw out, is manifested by the weak condition of the draft rigging and pocket attachments, and may be discovered by the inspector by a careful examination and inspec-

tion of that part of the equipment. The most marked manifestation of weakness noticeable upon inspection would be the loose condition of the draft rigging, the failure of the draft bolts to be properly tightened up, and failure to have the slack in the draft springs properly adjusted.

(b) Pulled-out drawbars sometimes result from unfair usage.

This may be caused by the improper use of the air brake; by reversing the engine; by attempting to take up the slack violently when it is necessary to start heavy trains; using too much steam in starting; stopping the train too quickly by emergency applications of the air; by sudden stops; by not waiting until the train gets in motion before giving the engine full head of steam.

In the defendant's answer there is no allegation of inspection or diligence in seeing that the coupling apparatus in use on the train in question was in serviceable condition, and no allegation that the breaking in two of said train was without negligence.

Breaking in two of trains by reason of defective couplers; or by reason of overloading the train; or by reason of sudden starting of the train; putting undue strain upon the coupling apparatus; are not so unusual in railroading as to give to such an occurrence the gravity and seriousness suggested by the terms "casualty," "unavoidable accident," or "act of God" named in the proviso.

Do they not come within the same category as hot boxes? As to hot boxes, District Judge Trieber said, in *United States v. Kansas City Southern Railway Company* (189 Fed., 471):

The officials of defendant could reasonably anticipate that hot boxes are likely to occur on every train, more especially on freight trains such as these were, and it ~~is~~ is their duty to take that fact, as well as the frequency with which other trains would be met, into consideration in establishing division or terminal yards, and determining the distances for them. If they failed to do so, and by reason of such failure crews on trains remained on duty for a longer period than 16 consecutive hours, it is guilty of a violation of this act.

In the case of *United States v. Kansas City Southern Railway Company* (202 Fed., 828) ~~involving~~ involving, among other things, delays caused by *defective flues* on the engine and a defective shaker rod, the court said:

To bring itself within the exceptions stated the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at and the practical operation of its railroad. Conformably to this view, it has been uniformly held by the courts that ordinarily delays in starting trains by reason of the fact that another train is late, from side tracking to give superior trains the right of way if the meeting of such trains could have been anticipated at the time of leaving the starting point,

from getting out of steam and cleaning fires, *from defects in equipment*, from switching, from time taken for meals, and, in short, from all the usual causes incidental to operation are not, standing alone, valid excuses within the meaning of this proviso. The carrier must go still further and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded.

The case just cited is also authority for the proposition that—

The excuses embodied in the proviso are separate and affirmative defenses (*C. B. & Q. R. Co. v. U. S.* (C. C. A.), 195 Fed., 241), which must be pleaded in the answer; and the burden is upon the defendant to sustain such allegations. Counsel for the railway company recognized this rule by the particularity with which they pleaded a latent defect in the coal, both at the outset and later by amendment, and also by assuming the burden of proof. If reliance was placed upon defects in the engine, such as a broken shaker rod and leaky flues, these defects should have been pleaded. The Government should have been advised of the defenses it would be required to meet. The answer contains no such specific averments, and a general denial was insufficient for the purpose.

And so in the case at bar.

The answer fails to establish any necessary relation between the overservice and the failure of the

railroad to relieve these employees at the expiration of the sixteen hours' service.

REPLY TO DEFENDANT IN ERROR'S BRIEF.

On pages 9 and 10 of the brief of defendant in error there appears a quotation from Senator Bacon in the course of the debate in relation to the bill which finally resulted in the statute now under consideration while the bill was on its passage.

Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (*United States v. Union P. R. R. Company*, 91 U. S., 72, 79; *Aldridge et al. v. Williams*, 3 How., 9, 24, Taney, C. J.; *Preston v. Browder*, 1 Wheat., 120; *Mitchell v. Great Works M. & M. Company*, 2 Story, 648, 653, 654; *Queen v. Hertford College*, 2 Q. B. D., 693, 707.)

Averments in answer of railroad in this case do not bring it within the rule in Missouri Pacific case.

The defendant in error cites in its brief (page 25 et seq.) the full text of the opinion in the case of the *United States* against *Missouri Pacific Railway Company* (213 Fed., 169). That case, however, is clearly to be distinguished from the case at bar in this, that in the Missouri Pacific case there was an averment in the answer of the railroad "*that through no fault or negligence of the defendant company, its agent or servant, a derailment occurred on the line of the defendant,*" the court in

that case saying that "this is an averment that, however high the degree of diligence and foresight required in regard to this derailment, the defendant exercised that degree, for so only could it have been without fault or negligence." This vital difference between the two cases renders it unnecessary to consider the other points relied on in the Missouri Pacific Railway case.

The defendant in error quotes twice in its brief paragraphs in the original brief of the Government as follows:

"In the case now under consideration the train was delayed by an unavoidable accident." And, "While the proceedings in the instant case ask credit only for the time lost by reason of an unavoidable accident," etc.

It is manifest that in each of these instances the statement made in the original brief of the Government referred only to the claim of the railroad that the train was delayed by an unavoidable accident. This is specially true in the second instance where reference is made to the pleadings of the railroad.

In the first quotation the meaning intended to be conveyed would have been clearer if the statement had been made that the train was delayed by occurrences which the defendant claimed to be an unavoidable accident. The continuation of the sentence is intended merely to call attention to the necessity of having men who have not been over-fatigued by long service in control of train opera-

tions because of the frequency of accidents peculiarly incident to train operation.

It is difficult to understand why the learned counsel of the defendant in error gives so much space to the opinion of Circuit Judge Grosscup in the case of *Atchison, Topeka & Santa Fe Railway* against *United States* (177 Fed., 114), and why emphasis is placed upon those parts of the opinion which assert that "the statute was enacted in view of the customs of the land," and "with custom as a background."

The Supreme Court afterwards reviewed that case, and in its opinion made no reference to the *customary* operation of railroads. The suggestion, however, of custom of railroads gives the Government an opportunity to call to the attention of the court a document to which we are at liberty to refer, Statistical Analysis of Carriers' Monthly Hours of Service Reports covering all instances in which employees were on duty during the fiscal year ending June 30, 1914, for longer periods than those provided by the Federal Hours-of-Service Act. (Interstate Commerce Commission, November, 1913.)

From this analysis it appears that during one year the railroads had 261,332 men employed for a longer period than that fixed by the statute. And so, under the operation of a mandatory statute fixing the limit of service, there are more than 250,000 cases of service in excess of the statutory period in one year.

It does not seem as if much light can be gained as to the construction of the act from the customs of the railroads.

The statute was enacted to put *an end to the custom* which permitted excessive periods of service, and its interpretation should manifestly be such as to effectuate the congressional intent.

The act was clearly intended to do away with the custom of requiring service in excess of the period fixed.

Only *gravely exceptional causes* were to excuse.

Customs of railroads to require service for longer periods than those fixed in the statute have no force or weight in the interpretation of an act of this character, or in enabling the court to reach a conclusion on a demurrer to an answer.

No question in the case in which Judge Grosscup delivered the opinion quoted is involved in the case at bar.

No authority can be found in any of the adjudications in any of our courts upon the hours-of-service law for the contention of the defendant in error that there are more than three cases of exception, and these are: First, casualty; second, unavoidable accident; third, act of God.

The Government contends that the latter part of the proviso which necessarily calls for the construction is to be read as if worded, "Nor where a delay necessarily causing excess service of an employee was the result of either of the foregoing causes, which causes of delay were not known to the car-

rier * * * at the time said employee left a terminal and which could not have been foreseen."

Otherwise any delay from *any* cause unknown when an employee left a terminal would be an excuse.

Unless the proviso is limited to the three causes specified, then it is unlimited in its application to *any* cause which occurs after an employee leaves a terminal.

This would render the statute practically a dead letter.

And the decisions of the courts have not given countenance to any such construction of the statute.

The suggested interpretation of a statement of Judge Holmes in *Missouri, Kansas & Texas Railway Company v. United States*, 34 Sup. Ct. Ref., 26, 27, quoted in defendant in error's brief (p. 50), with an intimation that it was treated *as undisputed*, has absolutely no foundation.

The learned justice was only stating the contention of the railroad in that case.

He said, "*It is urged* that the delay was the result of a cause * * * and that therefore * * * the act does not apply."

The mere recitation of a claim by one of the parties to an action as to a legal proposition affords no foundation for an inference that the court in any manner gives its support to such proposition.

Among the cases which seem to be conclusive against the contention of the defendant are: *United States v. Kansas City Southern Railway*

Co. (189 Fed., 471) ; *United States v. Kansas City Southern Railway Co.* (202 Fed., 828) ; *United States v. Denver & R. G. R. Co.* (197 Fed., 629) ; *United States v. Chicago, M. & P. S. Ry. Co.* (197 Fed., 624).

A decision October 30, 1914 (not yet reported), of District Judge Sessions, Western District of Michigan, in the case of *United States vs. Chicago & Northwestern Railway Company*, although involving telegraph operators, gives some light upon the questions here involved.

In that case the court said: " It thus appears that the accident which caused the delay in the departure of the circus train occurred a considerable time before the expiration of the period during which the operator might lawfully have worked. He had been continuously on duty since seven o'clock in the morning, and the train was not due to leave until nine o'clock at night. There is no showing that another operator could not have been procured. Accidents of this character often happen and are to be expected. They furnish neither justification nor excuse for a violation of a remedial statute like the one under consideration. (*United States v. Southern Pacific Railway Company*, 209 Fed. Rep., 562.)

The learned counsel for defendant in their brief (p. 33) italicize the paragraph in Judge Sanborn's opinion in the Missouri Pacific case as follows:

"But this is not an action for the negligence of the company in failing to procure a relief operator

within a reasonable time.” To be sure it was not. Nor is there any such action known to the law.

We assume that the learned court by this language meant to distinguish between an action for *failure to relieve* the operator in the case then under consideration and an action for *requiring* him to *remain on duty* in excess of period fixed.

But an action for “failure to relieve” lies only when the employee is one of the sixteen-hour class and is never maintainable where the employee is a telegraph operator.

In any event, the quotation so emphasized can have no application here, for the statute itself in its application to a train crew expressly provides that where an employee has been continuously on duty for sixteen hours “*he shall be relieved.*”

If under a count alleging *service* in excess of sixteen hours the facts proved show service beyond the period when the *statute* provides “*he shall be relieved,*” then the service beyond that period is unlawful and the action may be maintained as alleged.

CONCLUSION.

No interpretation which makes lawful service in train operation for more than sixteen hours, unless such excess service is *necessarily* the *result* of excusable causes, ought to be reached if the purpose and object of the statute is kept in mind.

When it is practicable to relieve after completion of sixteen hours’ train work, then the excess

service is not a necessary consequence of previous delays. It is then the result of negligence. Such negligence is inexcusable and affords no reasonable basis for a defence under this statute.

Whereas in the case at bar no effort is made to comply with the duty to relieve employees at the expiration of sixteen hours' service, it is respectfully submitted that further service was unlawful.

Respectfully submitted.

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